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No. 86-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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35 pp

QUESTIONS PRESENTED

Petitioners seek a writ of certiorari before judgment, and argument in tandem with *Hartigan v. Zbaraz*, No. 85-673 review granted, jurisdiction postponed, October 14, 1986. Petitioners[1] seek to have this court review a district court decision invalidating a Minnesota criminal abortion statute similar to the statute before this Court in *Zbaraz*. A principal difference between the instant case and *Zbaraz* is that this case was decided following a trial on the effect of the statute after five years of operation,[2] whereas *Zbaraz* is a facial challenge to a statute that has never gone into effect. The following questions would be raised in this writ:

1. Whether the district court erred in holding that *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983) precludes invalidation of the Minnesota parental notification judicial bypass statute as unconstitutional in its entirety, despite factual findings that after five years of operation it was substantially burdensome, failed to promote any state interests, and, in fact, undermined family integrity, communication, and privacy interests for many minors.

2. Whether the district court was correct in holding that the imposition of a mandatory 48 hour waiting period

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1 Hereinafter, all parties will be referred to by their designation in the district court. Petitioners (appellees in the Eighth Circuit) will be denominated "plaintiffs" and the respondents (appellants in the Eighth Circuit) "defendants" or the "State."

2 Minn. Stat. § 144.343(2)-(7), a criminal statute requiring two parent notification and a 48 hour waiting period prior to any minor's abortion with a judicial bypass, went into effect August 1, 1981. Between February 10, and March 13, 1986 there was a trial on the constitutionality of the statute which was enjoined on November 6, 1986. The district court held the requirement of notice to both biological parents was unconstitutional facially and as applied. (142a-151a.) (Citations to the record are contained in plaintiffs' separate Appendix and will be referred to as ____a.)

after constructive mailed notification to both parents before any abortion could be performed was unconstitutional.

3. Whether the district court was correct in holding unconstitutional a requirement that both biological parents be notified prior to a minor's abortion, regardless of whether they had ever married, or were separated or divorced, unless the minor obtained an order from a state court, and that the statutory definition of parent was not severable.[3]

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3 All three of these questions are listed, in slightly different form, in the State's listing of the issues on appeal filed in the Eighth Circuit on November 18, 1986. (140a-141a.)

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No. 86-

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the district court was issued on November 6, 1986 and is not reported. (34a-137a.)

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari of a "cas[e] in "a court of appeals "before . . . rendition of judgment or decree." Under 28 U.S.C. § 2101(e), a petition for certiorari before judgment has been rendered is timely "at any time before judgment." The defendants below filed and docketed their appeal in the Eighth Circuit Court of Appeals on November 18, 1986, No. 86-5423. The plaintiffs below docketed their cross appeal in the Eighth Circuit Court of Appeals on November 24, 1986.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Minnesota Statute § 143.343 (2)-(7) at issue in this case is reprinted in full in the Appendix. (142a-151a.)

STATEMENT OF THE CASE

A. History of Legislation

In April, 1981, the Minnesota legislature enacted Minn. Laws 1981 ch. 228, codified as Minn. Stat. § 144.343 (2)-(7).[4] This statute imposes civil and criminal penalties for performing an abortion on an unemancipated minor unless both of her parents are notified in advance. (146a-147a.)[5] The two parent

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4 The statute was an amendment to the Minors' Consent to Health Services Act, passed in 1971, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse § 144.343(1). (143a.) The health professional is permitted to inform parents only where failure to inform would jeopardize the minor's health. Minn. Stat. § 144.346. (151a.)

5 The exceptions to the two-parent notice requirement are where written consent is given, § 144.343(4)(b) (146a), the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c) (*id.*), or the physician certifies the minor's life is endangered and there is no time for notice, § 144.343(4)(a). (145a-146a.)

notice applies even where parents have never married, or are divorced or separated, as well as where there is an order of protection against an abusive spouse because of existing patterns of physical violence in the family. After mailed notice, a 48 hour waiting period is imposed with the time running from 12:00 the day after mailing or from 12:00 the next regular mail day. § 144.343(2)(b). (144a.)

Minn. Stat. § 144.343(6) provides that if subdivision 2 of the statute is ever judicially enjoined, the statute will be enforced by incorporation of the judicial bypass provisions in subsection 6, permitting a minor to go to state court for an order allowing her to have an abortion without notice either because she is "mature and capable of giving informed consent" or because an abortion without notice to both her parents would serve her "best interests." (147a-150a.)[6]

The district court found that the purposes of the Minnesota legislature in enacting this amendment were both to achieve several assumed salutary effects by encouraging parental discussion, and to deter and dissuade minors from having abortions altogether. (68a.)[7]

B. History of the Litigation

Plaintiffs consist of a class of mature minors seeking abortions in Minnesota without involvement of one or both their parents, a divorced mother who supports her minor daughter's abortion decision and fears notice to her ex-spouse, four medical clinics in Minnesota which together perform nearly all

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6 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court, (§ 144.343(6)(c)(ii)) (149a), for confidentiality and expedition in processing (§ 144.343(6)(c)(iii)), (149a), for expedited appeal and for access to the trial courts 24 hours a day, seven days a week (§ 144.343(6)(c)(iv)). (150a.)

7 The groups supporting this bill in the legislature were anti-abortion groups (171a-172a); in contrast, major medical, public health, and youth groups opposed the bill, including Minnesota Medical Association, Minnesota Public Health Association, Lutheran Social Services, American Association of University Women and others. (173a.)

the abortions in the state, and two physicians who provide abortion services for their minor patients. Defendants are the State of Minnesota, its Governor and Attorney General. (40a.)

Plaintiffs challenged the statute before it was implemented on the ground that facially and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. (4a.) On July 31, 1981, subdivision 2 requiring two parent notice without a bypass was temporarily enjoined; but § 144.343(2)-(6), notice with a judicial bypass procedure, was permitted to go into effect on August 1, 1981.[8] On January 23, 1985 the district court granted in part defendants' motion for summary judgment, but denied the motion on plaintiffs' claims that Minn. Stat. § 144.343(2)-(6) was unconstitutional as applied. (32a.)

Trial on the merits took place between February 10, 1985 and March 13, 1986. During trial the Court heard from seventy-five witnesses, including the Minnesota state court judges who collectively had heard over ninety percent of all the minors' judicial bypass petitions over the five years the statute was in operation, public defenders, guardians *ad litem* for the minors, physicians and counselors whose medical care for minors had been affected by the law, epidemiologists, experts in adolescent development and family communication, psychiatrists with clinic practices encompassing pregnant minors, twenty-four members of the minor class and four single parents or family members of pregnant minors.

The district court made extensive findings of fact concluding that this statute imposed a substantial burden on teenagers. The court there held that neither forced notice nor the judicial bypass "serve[d] the State's asserted interest in fostering intra-family communication and protecting pregnant minors" (111a), and in fact undermined family communication and involvement in some cases. (65a.) The burden of obtaining a

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8 On March 22, 1982 a preliminary injunction was issued as to Section 2 but denied as to § 144.344(2)-(6) the notice with a judicial bypass. (43a.)

judicial waiver was found to fall on a group composed almost entirely of mature or best interest minors. (112a.)

The district court stated that were it writing on a clean slate, § 144.343(2)-(6) would be unconstitutional because it failed to accomplish any state interests and unduly burdened minors. However, the court held *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983), precluded judicial review of the statute in its entirety and left the court with discretion only to review issues of statutory construction. (116a.) Although there was no proof that the 48 hour waiting period facilitated any parent/child communication, the district court ruled that *H.L. v. Matheson*,[9] 450 U.S. 398 (1981), precluded a holding that waiting periods are unconstitutional per se. The court, however, invalidated the 48 hour waiting period as excessively burdensome. (131a.)

The district court found the two parent requirement substantially burdensome and invalidated the two parent requirement facially and as applied, and enjoined the entire statute because of the inseverability of this requirement. (135a-136a.)

On November 18, 1986 defendants filed and docketed an appeal in the Eighth Circuit Court of Appeals. (138a-141a.) On November 24, 1986 plaintiffs filed and docketed their cross-appeal in the Eighth Circuit.

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9 In *H.L. v. Matheson*, 450 U.S. 398 (1981) the Supreme Court found H.L. to be an "immature" not "best interests" minor only because no proof was offered in the trial court either as to her maturity or as to the reasons she could not notify her parents. *H.L.*, 450 U.S. at 406.

C. The district court found and the evidence proved that parental notice with a court bypass was substantially burdensome to minors; its effects included increased medical risks caused by delay and the trauma of going to court, deterioration of medical care, and forced teenage motherhood for some mature and "best interests" minors.

The notification statute[10] was implemented on August 1, 1981, and as of March, 1986, 3,573 court petitions were filed by minors (64a), nearly one-half of all the minors seeking abortions. The district court found that although there was not "a systemic failure to provide a judicial bypass" in the most expeditious manner (53a), judicial bypass delayed minors by an average of two or three days just to get a court appointment, with a total delay of one week or more before their abortions. (56a-57a.) The court found these delays "unavoidable."[11] These delays forced some minors to have expensive,[12]

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10 The evidence proved that whether a statute requires parental notification or consent is irrelevant as they present equivalent burdens on minors. Indeed, in Minnesota, minors, parents, and medical personnel all use the terms notification and consent interchangeably. (152a-153a; 161a-162a; 164a; 168a.) A former Massachusetts judge testified in *Hodgson* that out of the 200 minors he saw pursuant to Massachusetts' law, (Mass. Gen. Laws, Chap. 112, 125S) which requires parental consent rather than parental notice, he could not recall one instance where the minor resorted to court after notice to the parents but where consent was refused. Minors went to court to avoid notice to the parents. (155a.)

11 A minor must first call a clinic to learn of her options. After this the teenager who chooses to go to court must call the court and get an appointment. Some counties have no sitting judges. (54a.) Class members Heather P. and Sharon L. had to wait two weeks and one and a half weeks respectively for abortions because of delay with court requirements. (158a-159a; 169a.) Three class members testified they were pushed into the second trimester, Cynthia J. and Bonnie L. (184a; 184a-188a); another was forced to go to Iowa with her mother. (167a-168a.)

12 A first trimester abortion averaged $225.00 (up to 12 weeks); a delay of even a few days raised this to $275.00 (12-14 weeks) for plaintiff minors. (178a.) For teenagers in the Duluth area, the delay also meant the additional cost of overnight travel to Minneapolis where second trimester abortions are performed. (178a.) There is no Medicaid funding for abortions in Minnesota. (167a-168a.) Teenagers were forced to hitchhike in the winter (166a-167a) and sleep in their cars. (183a.)

riskier[13] procedures, and the percentage of minors getting second trimester abortions increased.[14] The district court found that going to court produces "fear and tension" in minors, making them feel "guilty and ashamed." (58a.)[15] The court further found that some minors were so upset about going to court that they considered it more difficult than abortion and their anxiety affected the medical abortion itself. (58a.)[16] The court found the court bypass so daunting to some teenagers that some mature and best interest minors either notify, or forego the operation and carry to term. (58a.)[17]

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13 The district court found a one-week delay significantly increased medical risks. (56a-57a.) Dr. Willard Cates, former head of the Abortion Surveillance branch of the U.S. Centers for Disease Control, concludes that "delay [in getting an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion." Cates, *Adolescent Abortion in the United States*, 1 J. Adolescent Health Care, 18-25 (1980), p. 20.

14 Between 1978 and 1983 the percentage of minors obtaining second trimester abortions in Minnesota went from 18.4% to 23.0% (189a), an increase of 26.5%, statistics which an official from the Minnesota Department of Health, testifying as the state's witness, agreed was a public health problem. (156a-158a.) Furthermore, there is evidence that this number is increasing; Meadowbrook Women's Clinic, which does nearly all the second trimester abortions in the state, said as of December 1985; thirty percent of the minor patients were in the second trimester. (179a.)

15 The Director of the guardian *ad litem* program in Hennepin County who supervised or saw 2,264 minors who went through the court process testified that the teenagers are "very nervous, very scared. Some of them are terrified . . . [t]hey are often exhausted" and "feel like a criminal." (170a-171a.) One minor was scared literally speechless and turned mute. (182a.) Others vomit in court (176a), and one class member was aborting spontaneously in court and had to be accompanied by a nurse. (176a-177a.)

16 Some minors coming from court to the clinic have to be given sedatives (which were not given before this law) because of their vital signs from stress and pressure. (166a.)

17 Between 1981-1984 the rate of teenage childbirth in the city of Minneapolis went up *35.8%* for teenagers age 15-17 (190a), an increase compared to *.3%* for childbirths for 18-19 year olds (191a) who would be expected to share childbirth and abortion trends. (159a.) An

Further, medical care given minors who either went to court or faced notifying one or both parents, changed for the worse. The time pressures on minors, particularly those living outside of the two metropolitan areas where abortions are performed,[18] forced some physicians to forego using optimal medical procedures for the abortion. Insertion of laminaria, a technique which takes six hours, could not be used with court minors if the abortion had to be completed in one day because of time problems created by the court process. (182a-183a.)[19]

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epidemiologist employed by the Minneapolis Health Department attributed the disparity to the imposition of the parental notification law which affects only minors 17 and under. (154a.) The social, psychological economic and educational affects of teenage motherhood have been documented by this court. *Carey v. Population Services International*, 431 U.S. 678 (1977). It is 20 times safer in terms of mortality risks to have an early abortion as opposed to childbirth (LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 2 (1982), p. 191), and abortion at any stage of pregnancy is now safer than childbirth.

18 In Minnesota, no abortion providers are located in 82 out of 87 counties (45a), all abortion services are in the two metropolitan centers, Minneapolis and Duluth (46a), and out of 87 private and public hospitals in Minnesota, only two hospitals are generally open for abortion services. (45a-46a.) Because the farther a woman has to travel the less likely she is to get an abortion (47a), there is a great unmet need for abortion services in Minnesota. (159a-161a.) In general, women in Minnesota get abortions later than in the United States as a whole. Teenagers, who disproportionately receive second trimester abortions, can only receive such abortions in the Minneapolis-St. Paul area. (173a-174a.) Unfavorable publicity and bombings have dissuaded some Minnesota physicans from performing abortions. (49a.)

19 Plaintiff Dr. Jane Hodgson testified that although laminaria, a technique to dilate the cervix is usually used only for second trimester patients, she felt it was best medical practice to insert laminaria to dilate the cervix of some teenagers even in the first trimester because of their immature cervixes. (163a.) This could not be done for her teenage patients in Duluth who travel far to get to court, do not get through court until midafternoon, and must have their abortion and return home the same day. (164a-166a.) Dr. Hodgson was forced to choose between not using laminaria and not doing the procedure at all. (165a-166a.)

D. The court found and the evidence proved particular burdens imposed by requiring both parents be notified; and by the waiting period imposed after mailed notice.

Minn. Stat. § 144.343(3) requires that both biological parents be notified regardless of whether they are divorced, separated or never married, or whether there is an order of protection against one spouse because the family is one where violence is prevalent. The only exception is if the second parent cannot be located through "reasonably diligent effort," § 144.343(3). Because this is a criminal statute, requiring written proof verifying the representations of the minor, § 144.343(5), extraordinary delays were imposed on some minors in the course of obtaining such proof of compliance with the law.

For example, there was a two week delay in one case because the father initially refused to acknowledge paternity (163a-164a), and a two week delay in another case while waiting for a death certificate of the father to arrive from Massachusetts. (177a.) Further, the court found that many minors live in fear of violence, and are in fact victims of rape, incest or violence (81a); and that the exception for notice in the statute does not work for these minors. (59a.)

Only 50 percent of minors in Minnesota live with both biological parents. (80a.) The court found compelled notification of an abusive or disinterested absent parent in many divorce situations can "reintroduce" that parent's disruptive or unhelpful participation at a time of acute stress, and "provoke violence." (83a.) However, the law causes some minors who would naturally have told one parent not to do so because they had to go to court to avoid notice to the second parent. (85a.) Nonetheless, twenty to twenty-five percent of minors who go to court have notified one parent. (84a.) Many of those minors are accompanied to court by their mother, which the court found burdens both mother and daughter. (*Id.*) The court found the emotional trauma of the teenager and her mother who either go to court or notify an abusive father "tends to

interfere with and burdens parent-child communication, which the minor voluntarily initiated with the custodial parent." (62a.) The court held the law adversely affects voluntarily initiated communication in a large number of cases. (123a.)

Mailed notice to both parents involves a minimum of a 72 hour delay and the district court found the effective length of delay "may reach a week or more." (63a.)[20] The option is usually utilized to notify an absent parent, sometimes one the minor had never met. (163a-164a.)

E. The district court found, upon review of five years of experience, that neither the parental notice law nor the judicial bypass system achieved any of state purposes they set out to do.

The district court concluded ". . . [F]ive weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." (108a-109a.) In fact, besides being emotionally, medically, financially, and physically draining, the law was so burdensome some minors simply had unwanted children. (153a-154a.)

Out of the 3,593 petitions heard by Minnesota State Court judges, all but an "anomalous" nine[21] were granted on either "best interests" or "maturity" grounds. The state court judges who collectively heard over ninety percent of these cases testified at the trial, and none of them could identify any positive effect of the law. (69a.)[22] They did, however, all testify

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20 Because the Duluth Clinic is not open for abortions every day, mailed notice means a minor must often wait an entire week before the procedure can be performed, even when the minor has one parent's consent. (173a-174a.)

21 One minor was so scared about being in court she was rendered mute (182a); denial of her application was later reversed by the same judge. Other denials were in the first week of the law (67a), or because the minor wanted the denial. (65a.)

22 A former judge from Massachusetts testified that his experience with that state's parental consent law was identical to that of the judges in

as to the incredible stress inflicted on pregnant minors by going to court; one judge testified that a minor was so nervous her hands turned blue (71a); he also testified that the apprehension of the minors facing judicial approval was higher than in his trials involving child custody or orders for protection. (70a-71a.)

The bypass procedure completely failed to separate mature or best interests minors from immature non-best interest minors. (110a-111a.) The court found, based on expert testimony, testimony of the judges, and the statistics, that the statute "imposes the substantial burden of obtaining a judicial waiver of . . . notification . . . [on] a group of minors composed almost entirely of either mature . . ." or best interests minors. (112a.) The Court further rejected the possibility that the statute's very existence encouraged some immature non-best interest minors to notify their parents when they otherwise would not have done so. Based on expert testimony and statistics showing no increased notification after the law the court concluded that the statute does not have "any greater beneficial effect upon immature minors" than upon mature or best interest minors. (111a.)

The court concluded that the substantial burden imposed by § 144.343(2)-(7) "is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343(2)-(7) fails to further either of those interests in any meaningful way." (113a.)

Minnesota. Although personally opposed to abortion for religious and moral reasons, he found all 200 minors appearing before him "mature." (155a.) He stated that the law ". . . just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion. . . ." (71a; 156a.)

REASONS FOR GRANTING THE WRIT

I. Because The Fully Developed Factual Record In *Hodgson* Conclusively Demonstrates That A Parental Notice, Waiting Period, And Judicial Bypass Scheme Undermines And Fails To Achieve Any Asserted State Interest, This Case Should Be Considered In Tandem With This Court's Review Of The Facial Validity Of The Mandatory Waiting Period In *Hartigan v. Zbaraz*.

This Court has granted writs of certiorari before judgment pursuant to 28 U.S.C. § 1254(1) and Rule 18 of the Rules of this Court, where many of the factual and legal issues presented by a petition are identical to those presented in a case already granted review and pending.[23] This Court has construed § 1254(1) to permit "any party," even the prevailing

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23 *United States v. Thomas*, 361 U.S. 950 (1960) (certiorari granted before judgment because the issues pending in *U.S. v. Raines*, 362 U.S. 17 (1960)) "are pertinent to the disposition of this case"); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (certiorari granted before judgment "because of the pendency here of *Greene v. McElroy*," 360 U.S. 474 (1959), which involved essentially the same important constitutional issues); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (taking judicial notice of *Bolling v. Sharpe*, then pending in the Court of Appeals for the District of Columbia, and inviting the filing of a petition for certiorari before judgment in order to consider constitutional issues similar to those pending in other cases before the Court, which was subsequently granted, 344 U.S. 873 (1952)); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946)). *Cf. Fixa v. Heilberg*, 379 U.S. 997 (1965) (noting probable jurisdiction over case raising same issues as *Lamont v. Postmaster General*, 379 U.S. 926 (1965)). *See generally* Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed.) §§ 2.3, 4.20.

In addition, the Supreme Court has granted certiorari when there have been cases pending in the circuit courts with the same or similar issues. *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12, n.1 (1963); *Hannah v. Larche*, 363 U.S. 420, 422 n.3 (1960); *McElroy v. Guagliardo*, 361 U.S. 281, 283 (1960); *Reid v. Covert*, 354 U.S. 1, 5 (1957); *Graham & Foster v. Goodcell*, 282 U.S. 409, 415 n.2 (1931); *Johnson v. United States Shipping Board*, 280 U.S. 320, 25 (1930); *White v. Mechanics Securities Corp.*, 269 U.S. 283, 299 (1925).

party, to petition for certiorari before judgment so long as the losing party has appealed and the record is docketed therein. *E.g., Norman v. Baltimore & O.R. Co.*, 418 U.S. 683, 686-87 nn.1 and 2 (1974); *Youngstown v. Sawyer*, 343 U.S. 579 (1952); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935); *see* Stern, R., Gressman, E., and Shapiro, S., *Supreme Court Practice*, (6th Ed.) § 2.4 (1986).

This Court granted limited review in *Zbaraz* to consider the constitutionality of a 24 hour waiting period for all minors before an abortion following notification of both parents, where a judicial bypass procedure is provided on the face of the statute. 55 U.S.L.W. 3060 (U.S. October 14, 1986). The Minnesota court in *Hodgson* found a similar law unconstitutional based on a complete record demonstrating the actual burdens and striking absence of beneficial effect evident after five years of the statute in operation. (130a-131a.)

Both *Zbaraz* and *Hodgson* involve the constitutionality of a requirement that minors notify *both* parents before they may obtain an abortion. Both cases contain a mandatory waiting period following notification (24 and 48 hours respectively) in all or some circumstances and both cases involve statutes which appear on their face to provide minors with a judicial means of bypassing the notification requirement.

While the cases present many similar legal questions, they are different in one crucial respect. The *Zbaraz* case challenges the Illinois law on its face while the *Hodgson* decision determined that, but for this Court's decision in *Ashcroft*, the Minnesota law would be unconstitutional as applied after five years of operation. *See generally*, Point II, *infra*. The findings of fact made by the district court in Minnesota on a fully developed trial record offer a rare preview of the true effect of permitting the State of Illinois its requested "latitude" in "experiment[ing]" with the lives of pregnant minors within its borders. *See* Jurisdictional Statement of Appellant in *Zbaraz* at 11.

A determination of the facial validity of a 24 hour mandatory waiting period following notification of a proposed abortion to *both* parents of a pregnant minor necessarily depends upon facts which, if not present in the record, may be assumed by this Court. *See, e.g., H.L. v. Matheson*, 450 U.S. 388 (1981). In defending the constitutionality of laws such as those at issue here, a state must prove that they are necessary, narrowly tailored, and will actually serve state interests previously recognized as significant or compelling by this Court. *H.L. v. Matheson*, 450 U.S. at 413; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. October 14, 1986); *see also City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983). Such conclusions of law necessarily rest on empirical facts about teenagers, their needs, their families and the effect of involuntary communication on family relationships and on the decision-making processes. Although both the decision of the Seventh Circuit and appellants' Jurisdictional Statement to this Court in *Zbaraz* rest on numerous factual assumptions, the *Zbaraz* case offers only a limited factual record upon which this Court may assess the accuracy of those assumptions.[24]

Indeed a close analysis of the state's Jurisdictional Statement in *Zbaraz* reveals its defense of the statute to be based upon many assumed facts which are directly counter to the record and findings of fact in the *Hodgson* case.[25] For example, the

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24 Of course the *Zbaraz* case is a facial challenge to the statute and thus there is only limited factual evidence as to the *actual* burdens and benefits of the statute in operation. As a general matter, a full factual record is advisable in determining constitutional questions of great public importance. *See e.g., Socialist Party v. Gilligan*, 406 U.S. 583 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 575 (1947); *Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 762-63 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945).

25 The *Hodgson* case is the first and so far the only challenge to a parental involvement and judicial bypass law in operation to be tried. *See generally*, Point II *infra*.

State of Illinois repeatedly contends that its notification and waiting period requirement are reasonable "means to attain the state's objective of protecting family integrity and ensuring a well-informed decision" to abort by a pregnant minor. *E.g.*, Jurisdictional Statement of Appellant in *Zbaraz* at 18. However, the District Court in *Hodgson* found the following:

> Defendants offered the Court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. . . . The Court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity."

(78a-79a.)[26]

Further, Illinois presumes that minors subjected to its notification and waiting period requirements "have available to them avenues for by-passing notification. . . ." Jurisdictional Statement at 15. However, the district court in *Hodgson* found that "some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term." (58a.) Moreover, immature and non-best interest minors "rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents,

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26 *See also Adolescent Abortion: Psychological and Legal Issues.* Summary of Report, Interdivisional Committee on Adolescent Abortion, American Psychological Association. (192a.)

obtain an abortion outside Minnesota, or carry the pregnancy to term." (75a.)

Finally, the State of Illinois repeatedly attempts to justify its waiting period as a reasonable way to "assure that consultation will occur" following notification. *E.g.*, Jurisdictional Statement at 9. Yet the district court in Minnesota noted that inadvertent or involuntary communication has an "almost universally negative" effect, (78a) (quoting testimony of expert witness), and that a two parent notification requirement affirmatively discourages and damages parent-child consultation. (122a-124a) (regarding the law in general).

If the Illinois law were ever to go into effect,[27] it would likely create the same senseless non-beneficial burdens on the lives of minors and their families which Minnesota has witnessed. In determining the constitutionality of the Illinois law, and in necessarily assuming facts not in the record to that end, this Court should be mindful of the Minnesota experience and should therefore grant the instant petition to permit the cases to be considered in tandem.

II. Whether Minnesota's Parental Notification Law Is Unconstitutional As Applied And Whether The District Court In *Hodgson* Erred In Concluding That *Planned Parenthood v. Ashcroft* Precludes Such A Conclusion Are Questions Of National Importance Necessitating Prompt Resolution By This Court.

Petitions for certiorari before judgment will be granted "upon a showing of imperative public importance." Supreme Court Rule 18; *see* U.S.C. § 1254(1). As this Court's decision to review the opinion of the Seventh Circuit in *Zbaraz* indicates, the issues presented in *Hodgson* are of such importance. Resolution of these issues should not await a decision by the Court of Appeals.[28]

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27 In *Zbaraz*, the Illinois law is challenged both on its face and in effect.

28 Certiorari before judgment has been granted in cases of great constitutional significance. *E.g.*, *Youngstown*, 343 U.S. 579 (1952);

A. Minors' Notice and Consent Laws Have A Profound, Widespread and Irreparable Impact And Their Constitutionality Is An Issue of Imperative Public Importance.

The trial of the *Hodgson* case was the first time that a federal court "had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation." (104a-105a; 115a.)[29] This opportunity came none too soon, because five weeks of testimony conclusively demonstrated that the judicial bypass option is indeed the nightmare envisioned by Justice Stevens in his opinion in *Bellotti v. Baird*, 443 U.S. 622 (1979). As predicted, "the need to commence judicial proceedings in order to obtain a legal abortion . . . impose[s] a burden at least as great as, and probably greater than, that imposed on the minor child by the need to [notify or] obtain the consent of a parent." 443 U.S. at 655 (Stevens, J. concurring) (footnote omitted).[30]

Carter v. Carter Coal Co., 298 U.S. 238, 285 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

Certiorari before judgment has also been granted in a variety of other cases presenting issues of extraordinary national importance. *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974); *United Mine Workers*, 330 U.S. at 269; *Ex Parte Quirin*, 317 U.S. 1, 18-19 (1942). *See generally*, Stern, Gressman and Shapiro, *Supreme Court Practices* at § 4.20.

29 All previous cases on a minor's right to choose which have reached this Court, for example, have involved statutes enjoined before or at the time they took effect, except *H.L. v. Matheson*, 450 U.S. at 405-406, which was attacked facially with no record. *See, e.g.*, *Akron*, 462 U.S. at 425 (enforcement of ordinance enjoined before effective date); *Planned Parenthood Association of Kansas City v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980) (statute at issue in *Ashcroft*, 462 U.S. 476 enjoined on day after becoming effective); *Bellotti*, 443 U.S. at 645 n.25 (statute enjoined before going into effect in "absence of any evidence as to the operation of judicial [bypass] proceedings. . . .").

30 The suggestion in *Bellotti* that a bypass procedure *might* remove the unconstitutional burdens imposed by mandatory consent was advisory in nature in that no such statute was before the Court at that time. *See Bellotti*, 443 U.S. at 656 n.4 (Stevens, J., concurring); *but see Ashcroft*, 462 U.S. at 479-480 in which such a law was before the Court.

Minnesota's experiment with a statutory scheme of the sort suggested in *Bellotti* and reviewed in *Ashcroft* has proved a dismal failure. It is painfully clear after trial that even a bypass procedure which was found *not* suffering from any failure other than that inherent in its operation,[31] delays and deters minors seeking to terminate pregnancy, (52a; 57a-58a), subjects them to emotional trauma, (62a), affirmatively discourages and interferes with voluntary communication, (61a-62a), and utterly fails to serve any of the interests which the state advances in an effort to justify the imposition of such substantial burdens on the exercise of a fundamental constitutional right. (112a-113a.)[32]

At present, twenty states have made similar attempts to experiment with state-mandated family communication.[33] Five states have not even attempted to comply with the facial guidelines of *Bellotti* and *Ashcroft* through the provision of a

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31 The district court found that the Minnesota bypass procedure was not suffering from systemic failure. (52a-53a.)

32 Moreover, as the district court found, there is some evidence that Minnesota actually intended the statute to have these effects. (68a.) (". . . a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature".)

33 *NOTIFICATION*: *Arizona*: Ariz. Rev. Stat. Ann. § 36-2152 (1986); *Idaho*: Idaho Code § 18-609(6) (Supp. 1986); *Illinois*: Ill. Ann. Stat. ch. 38 paras. 81-54.4, 81-64.4 (Smith-Hurd Supp. 1986); *Maryland*: Md. Health-Gen. Code Ann. § 20-102, 103 (1982); *Minnesota*: Minn. Stat. Ann. § 144.343 subd. 6 (West Supp. 1986); *Montana*: Mont. Code Ann. § 50-20-107 1985; *Nevada*: Nev. Rev. Stat. Ann. § 44.2 253 (Michie 1986); *Ohio*: Ohio Rev. Code Ann. § 2919.12 (Anderson Supp. 1985); *Utah*: Utah Code Ann. § 76-7-304 (1978); *West Virginia*: W. Va. Code § 16-2F-3(a) (1985). *CONSENT*: *Indiana*: Ind. Code Ann. § 35-1-58.5-2.5 (1983); *Kentucky*: Ky. Rev. Stat. Ann. § 311.732 (Michie/Bobbs-Merrill 1983); *Louisiana*: La.Rev. Stat. Ann. § 40:1299-35.5 (West Supp. 1986); *Massachusetts*: Mass. Gen. Laws Ann. Ch. 112, § 12S (West 1983); *Mississippi*: Mississippi Laws 1986, Leg. Sess., Ch. 448; *Missouri*: Mo. Ann. Stat. § 188.028 (Vernon 1983); *North Dakota*: N.D. Cent. Code § 14-02.1-03.1 (1981); *Pennsylvania*: 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); *Rhode Island*: R.I. Gen. Laws § 23-4.7-6 (1985); *South Carolina* S.C. Code Ann. § 44-41-30 (Law Co-op 1976).

judicial bypass procedure.[34] Of those which do have a bypass, seven are presently under court injunction for facial invalidity and these cases are pending in district courts and courts of appeals nationwide.[35]

In seven states bypass laws are actively being enforced.[36] Statistics for Minnesota and Massachusetts show that in those two states approximately seven to eight thousand minors have thus far been compelled to navigate a judicial obstacle course in order to exercise their fundamental rights.[37] While all but an anomalous few of these minors have been granted the right to obtain the confidential abortion which is their right, (65a), untold numbers of minors have carried to term, been delayed into the second trimester of pregnancy, traveled out of state,[38] or incurred family crises due to notification against their better judgment. (58a-59a.) At the same time it is clear that these judicial bypass procedures fail to separate mature from imma-

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34 Idaho, Maryland, Montana, South Carolina, and Utah.

35 Illinois: *Zbaraz v. Hartigan*, 584 F. Supp. 1482 (N.D. Ill. 1984), *Aff'd in part, rev'd in part*, 763 F.2d 1532 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. October 14, 1986); Kentucky: *Eubanks v. Collins*, No. C82-0360-L(A) (W.D. Ky., July 10, 1986); Mississippi: *Barnes v. State of Mississippi*, No. 86-0458 (S.D. Miss., filed July ____, 1986); Nevada: *Glick v. McKay*, No. CV-R-85-331-BRT (D.C. Nev., June 17, 1986), No. 85-2335 (9th Cir., filed July 19, 1986); Ohio: *Akron Center for Reproductive Health v. Slaby*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeals docketed*, No. 86-3664 (6th Cir. ____, filed July 7, 1986) (appeal of State of Ohio), No. 36-3717 (6th Cir., filed , 1986) (appeal of Defendant Slaby); *Pennsylvania: American College of Obstetricians & Gynecologists v. Thornburg*, 737 F.2d 283 (3d Cir. 1984), 476 U.S. ____, 90 L.Ed. 2d 779, 106 S.Ct. ____ (1986); Utah: *L.R. v. Wilkinson*, Civ. No. C-80-0078J (D. Utah, July 23, 1984) (enjoined as to emancipated minors).

36 Minnesota (until November 6) and Massachusetts. Indiana, North Dakota, Missouri, Rhode Island, Louisiana.

37 In Minnesota 3,573 bypass petitions were filed from August 1, 1981 to March 1, 1986. (64a.) For the Massachusetts statistics *see* Donovan article cited *infra* note 38.

38 In Massachusetts, one third of the minors go out of state for abortions to avoid either notifying their parents or going to state court. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 6 (1983), p. 259.

ture minors, offer no counseling and result in an overall decrease in parent-child communication. (75a-77a.)

These laws are a daily catastrophe in the lives of pregnant minors. Their constitutionality is a perennial question in the federal courts as more and more states enact them. This Court will be asked to review the decisions of these lower courts in an endless parade of 'record-less' facial challenges already in the judicial pipeline.

Few statutory schemes adversely effect rights so important and yet so besieged. Few laws affect so profoundly and so permanently the lives of as many. And few legal questions are being considered by so vast a number of legislatures and courts at this very moment. Under such circumstances, the *Hodgson* court's erroneous conclusion that it was precluded from invalidating a law which it found to accomplish *no* state purpose after five years of operation, presents a question of imperative public importance necessitating prompt review by this Court.

B. The District Courts' Conclusion That It Was Foreclosed from Invalidating the Minnesota Law As Applied Is An Issue of Public Importance Necessitating Prompt Review.

The district court in *Hodgson* felt bound to reject petitioners' as applied challenge to the Minnesota law because of earlier decisions of this Court, despite a factual record resoundingly compelling a contrary result. (115a-116a.) ("[w]ere this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343(2)-(7). . . .").

The court relied on those cases which remind lower courts that they are not free to overrule Supreme Court cases or to disregard applicable precedent. *E.g*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd*, 460 U.S. 533, 535 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 1316 (1983). However, the Minnesota court was not faced with *applicable* precedent of this Court but was instead faced with rules of law set forth in *Bellotti* and *Ashcroft* based upon *facial* challenges and an utter absence of facts. *See Bellotti*, 443 U.S. at 656 (Stevens, J. concurring).

To hold Minnesota's parental notification law unconstitutional as applied based on its operating record is not equivalent to overruling or disregarding the principle that the Minnesota law may be constitutional on its face under *Bellotti* and *Ashcroft*. That the "as applied" record in *Hodgson* was to a great extent inconsistent with factual assumptions made without a comparable record by this Court in those cases, leads only to the conclusion that the rules of law set forth in those cases are inapplicable and do not determine the as applied constitutionality of Minnesota's law.[39]

The Minnesota court nevertheless concluded that it must reject petitioner's challenge to the bypass law "as a whole." (120a.) The court erroneously concluded that because the facial challenge to the Missouri statute reviewed in *Ashcroft* presented an issue purely of statutory construction, 462 U.S. at 491-92, the voluminous factual record and the astounding findings of fact set forth in its opinion are immaterial to determining the constitutionality of any post-*Ashcroft* bypass law. (115a-116a.) But the issue before the Court in *Ashcroft* was primarily one of statutory construction, because the statute had been enjoined *before* it went into effect and thus, there was no opportunity to develop a factual record such as the one developed in *Hodgson*.

By contrast, it cannot be disputed that the *real* effects of a law are critical to an assessment of its constitutionality when those effects can be detected and proved in a court of law. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). For example, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect," *Wright v. Council of the City of Empo-*

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39 Of course the concept that rules of law may lead to different results in different factual circumstances is part of the very fabric of our system of civil law.

ria, 407 U.S. 451, 462 (1972), and a statute must "measurably contribute[ ] to the . . . purposes which the State advances as justification for the" restrictive legislation. *Carey v. Population Services International*, 431 U.S. 678, 702 (1977) (White, J., concurring). Questions of whether a statute actually burdens the plaintiff class, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or substantially serves the asserted state interests, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980), have always been critical components of the strict scrutiny of state legislation which interferes with the exercise of fundamental rights.[40]

Because these are first and foremost factual inquiries, courts have invariably required a state defending such a law to come forward with *evidence* that the challenged statute *in fact* narrowly serves the purported state interests. *See Carey*, 431 U.S. at 696; *High Ol' Times, Inc. v. Busbee*, 456 F. Supp 1035 (N.D. Ga. 1978), *aff'd*, 621 F. 2d 141 (5th Cir. 1980); *see also Anderson v. Celebrezze*, 460 U.S. 780, 796-801 (1983); *Thomas v. Review Board*, 450 U.S., 707, 718-19 (1981); *Wengler*, 446 U.S. at 151-52; *Carey*, 431 U.S. at 696. In so doing, this Court has fastidiously examined the factual record proferred by the state in support of legislation which infringes on fundamental rights. *E.g.*, *Mississippi University for Women v. Hogan*, 458 U.S. 719, 730 (1982); *Craig v. Boren*, 429 U.S. 190, 200-03 (1976).[41]

Further, it cannot be disputed that a statute which is constitutional on its face may nevertheless be unconstitutional as applied. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 97 n.131 (1976); *Storer*, 415 U.S. at 740; *Euclid v. Ambler*, 272 U.S. 365, 395-97 (1926); *Alabama State Federation of Labor v.*

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40 *See, generally*, cases cited *supra* note 2.

41 "In general, 'constitutional litigation' demands fact analysis of the most particularized kind." Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75 . . . It is questionable whether assumptions and widely-held beliefs have a role to play in such analysis." *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3rd Cir. 1986); *see also In Re Gault*, 387 U.S. 1, 21-22 (1967).

McAdory, 325 U.S. at 461-62; *United States v. Salerno*, 794 F.2d 64, 788 (2d Cir. 1986) (Feinberg, C.J. dissenting). For example, in considering *Bellotti* as applied, which challenged the constitutionality of a Massachusetts law, the First Circuit noted that "a requirement unduly burdensome in operation [as to offend due process] will be struck down even if not clearly invalid on its face." *Planned Parenthood League of Massachusetts v. Belloti*, 641 F.2d 1005, 1011 (1st Cir. 1981) (review of preliminary injunction "on a record [as yet] undeveloped as to the actual operation of the judicial approval procedure"); *see also T.L.J. v. Ashcroft*, No. 830-4398-CV-C-5 (W.D. Mo. November 4, 1983) (as applied challenge to statute at issue in *Ashcroft* 462 U.S. 476).

Finally, it is clear that legislation which burdens a fundamental right may not be justified by "archaic and overbroad generalizations" unsupported by evidence of any kind. *See Hogan*, 458 U.S. at 730 n.16. As such, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Carolene Products*, 304 U.S. at 153; *see, e.g., In Re Gault*, 387 U.S. at 21-22 (1967); *Brown v. Board of Education*, 347 U.S. 483 (1954). *New Jersey Citizen Action*, 797 F.2d at 1260; Karst, note 40 *supra* at 108. Prior factual assumptions, particularly those made in the course of a facial challenge without a factual record, must be re-evaluated if they have changed or have become inapplicable in a particular context. *Cf. New Jersey Citizen Action*, 797 F.2d at 1257 (When fundamental rights are "patently burdened, the district court not only is free to, but indeed is required to overturn regulations that are premised on legislative assumptions contradicted by facts in the record").

The district court's conclusion that it was precluded from invalidating the Minnesota law "as a whole," flies in the face of these principles and of every known standard of constitutional review. To hold that the *real* empirical impact of a statute is without effect on the constitutional result is to place

precious civil liberties in jeopardy and to turn constitutional review into a formalistic exercise. These are issues of imperative public importance which would be unaltered by intervening consideration in the court of appeals.

CONCLUSION

This Court should grant a Writ of Certiorari before Judgment and should consider the *Zbaraz* and *Hodgson* cases in tandem.

Respectfully submitted,

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86-882

No. 86-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a non-profit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE; ALICE ROE; DIANA ROE; NADINE T. JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a non-profit Minnesota corporation; and WOMEN'S HEALTH CENTER OF DULUTH, P.A., a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

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MEMORANDUM ORDER

American Civil Liberties Union Foundation, by JANET BENSHOOF, Esq. and DELSIA MARSHALL, Esq., New York, New York; Minnesota Civil

Liberties Union, by LINDA OJALA, Esq. Minneapolis, Minnesota; and Mackall, Crounse & Moore, by FRANZ P. JEVNE, III, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, by JOHN GALUS and PETER M. ACKERBERG, Special Assistant Attorneys General, St. Paul, Minnesota, appeared for defendants.

This matter comes before the court upon defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the parental notification/judicial bypass procedure of 1981 Minn. Laws ch. 228 (codified at Minn. Stat. § 144.343 subd. 6). Subdivision 6 requires, before an unemancipated minor can obtain an abortion in Minnesota, that either both parents be notified or, alternatively, that a state court judge determine that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, or, if the woman is not mature, that an abortion without notification of her parents would be in her best interests.

Plaintiffs, a class of minor women seeking abortions, a parent of a minor, four clinics, and three doctors who perform abortions, commenced this action on July 30, 1981, seeking injunctive and declaratory relief. On July 31, 1981, this court temporarily restrained enforcement of subdivision 2 of Minn. Stat. §144.343, which would have required written notice to both parents before an abortion could be performed upon an unemancipated minor. Thus, on August 1, 1981, subdivision 6 of Minn. Stat. § 144.343, which requires that a minor obtain either parental notice or judicial approval prior to having an abortion, went into effect and has remained in effect since that date. On March 22, 1982, this court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6.

Plaintiffs raise three claims concerning the notification/judicial bypass proce-

dure. First, plaintiffs allege that the notification/judicial bypass procedure deprives them of liberty without due process of law in violation of the fourteenth amendment, both on its face and as applied. Amended complaint ¶ 50. Second, plaintiffs allege that the notification/judicial bypass procedure deprives them of equal protection of the laws in violation of the fourteenth amendment. Id. ¶ 51(a), (b). Finally, plaintiffs allege that the notification/judicial bypass procedure violates various provisions of the Minnesota Constitution. Id. ¶¶ 53, 54.

I. Summary Judgment Standard

The standards governing summary judgment are well established. Under Fed. R. Civl P. 56 (c), the district court shall render summary judgment "if the pleadings, deposition, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Eighth Circuit Court of Appeals has emphasized the drastic nature of the summary judgment remedy, finding it appropriate only if "the moving party has established his right to a judgment with such clarity as to leave no room for controversy and the non-moving party is not entitled to recover under any discernible circumstances." Camfield Lines, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364 (8th Cir. 1983) (quoting Butler v. MFA Life Insurance Co., 591 F.2d 448, 451 (8th Cir. 1979)). All evidence must be viewed in the light most favorable to the non-moving party. Adickes v. S.H. Cress & Co., 398 U.S. 144, 158-59 (1970). The court must give the non-moving party the benefit of all reasonable infer-

ences to be drawn from the underlying facts. Trnka v. Elanco Products Co., 709 F.2d 1223, 1225 (8th Cir. 1983). However, this court recognizes the remedy's salutary purpose of avoiding useless, expensive and time-consuming trials. Id.; Percival v. General Motors Corp., 539 F.2d 1126, 1129 (8th Cir. 1976).

II. Due Process

A. Facial Constitutionality

In addressing the facial constitutionality of Minnesota's notification/judicial bypass procedure under the due process clause, the court is presented with a legal issue which can properly be resolved on a summary judgment motion. Fed. R. Civ. P. 56(c).

In a series of recent cases, the United States Supreme Court has addressed the constitutionality of parental notice or consent requirements and alternative judicial bypass

procedures as prerequisites to a minor's receiving an abortion. See Planned Parenthood Association of Ashcroft, 103 S. Ct. 2517 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Belloti v. Baird, 443 U.S. 622 (1979) (Bellotti II); Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti I); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The relevant legal standards, in the words of the Supreme Court, "are not in dispute." City of Akron, supra, 103 S. Ct. at 2497-98.

In Bellotti II, the Supreme Court struck down as unconstitutional a Massachusetts statute requiring judicial approval in lieu of parental consent. The Court concluded that although the Massachusetts statute satisfied constitutional standards in large part, it fell short in two crucial respects. First, it permitted judicial au-

thorization for an abortion to be withheld from a minor who was found by the hearing court to be mature and fully competent to make the decision independently. Second, it required parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that an abortion would be in her best interests. 443 U.S. at 651.

Justice Powell, in announcing the judgment of the court and delivering a plurality opinion joined in by three other justices, characterized his discussion of possible alternative approval procedures as an "attempt to provide some guidance as to how a State constitutionally may provide for adult involvement -- either by parents or a state official such as a judge -- in the abortion decisions of minors." Id. at 651-52 n.32.

In dictum, the Powell plurality opinion sets forth these constitutional guidelines:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity -- if she so desires -- to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Id. at 647-48. Although the guidance expressed in the Powell plurality opinion represents the views of only four Justices, it appears that a fifth Justice, White, who dissented in Bellotti

II on the ground that he found the Massachusetts statute to be constitutional, would also find this less restrictive version constitutional as well. Id. at 656-57 (White, J., dissenting); see also Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1010 n.6 (1st Cir. 1981).

The judicial bypass procedure outlined by Justice Powell in Bellotti II has been specifically endorsed by the Court in subsequent decisions. See Ashcroft, supra, 103 S. Ct. at 2525-26; City of Akron, supra, 103 S. Ct. 2497-99. In Ashcroft, the Supreme Court affirmed the constitutionality of a Missouri parental consent/judicial bypass procedure conforming to the Bellotti II standards. See Ashcroft, supra, 103 S. Ct. at 2526, aff'g 655 F.2d 848, 857-60 ;(8th Cir. 1981).

Likewise, the Minnesota notification/judicial bypass procedure, Minn. Stat. § 144.343 subd. 6, satisfies the constitutional requirements expressed in Bellotti II. Subdivision 6(c)(i) requires a judge of a court of competent jurisdiction, after an appropriate hearing, to authorize a physician to perform an abortion upon a pregnant minor without parental notification if the judge determines that the pregnant woman is mature and capable of giving informed consent, or, if not mature, that an abortion without parental notification would be in the pregnant woman's best interests.

Plaintiffs' present four objections to the facial constitutionality of the Minnesota notification/judicial bypass procedure under the due process clause. First, plaintiffs suggest that

Minnesota's parental notification statute raises different constitutional issues from the parental consent statutes analyzed by the Supreme Court in Bellotti II, Akron, and Ashcroft. This court disagrees. The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional. See Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d 1127, 1131-32 (7th Cir. 1983) (applies Supreme Court's constitutional analysis respecting consent bypass procedures to constitutional analysis of notification bypass procedures).

Second, plaintiffs argue that the two parent notification requirement of the Minnesota statute unconstitutionally burdens a minor's right to seek an abortion. The Supreme Court, however, in Bellotti II, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. Bellotti II, supra, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

Third, plaintiffs contend that any decision on the "facial" challenge to the Minnesota statute is premature at this time because it is inherently intertwined with the "as appied" challenge. Plaintiffs provide no support

for this proposition in the context of parental consent notification/judicial bypass statutes. In fact, a number of courts have upheld the facial constitutionality of analogous statutes without addressing the constitutionality of the statute as applied. See, e.g., Ashcroft, supra, 103 S. Ct. 2517; Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1011. This court therefore rejects plaintiffs' argument and will rule on the facial constitutionality of the challenged statute.

Finally, plaintiffs assert generally that the Minnesota statute lacks procedural protections. Once again, this court cannot agree with plaintiffs' argument. The Minnesota statute provides a variety of procedural protections to pregnant minors. The statute permits the pregnant woman to partici-

pate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem. Minn. Stat. § 144.343 subd. 6(c)(ii). Further, proceedings under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. Minn. Stat. § 144.343 subd. 6(c)(iii). This requirement is consistent with Justice Powell's recommendation in Bellotti II that the proceedings "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Bellotti II, supra, 443 U.S. at 644. The statute also requires that the judge of the court who conducts the proceedings shall make written fac-

tual findings and legal conclusions and maintain a record of the evidence. Minn. Stat. § 144.343 subd. 6(c)(iii). Finally, the statute makes available to any pregnant woman for whom the court denies an order authorizing an abortion without notification an expedited confidential appeal, waives filing fees at both the trial and appellate levels, and provides access to both the trial and appelate courts on a 24-hours a day, 7 days a week basis. Minn. Stat. § 144.343 subd. 6(c) (iv).

This court concludes that the Minnesota notification/judicial bypass procedure conforms with the constitutional principles first espoused in Bellotti II and endorsed by subsequent decisions. The statute does not, on its face, unduly burden the exercise of a minor's fundamental right to choose an

abortion. Accordingly, plaintiffs' due process challenge to the facial constitutionality of the Minnesota judicial bypass procedure must be rejected and defendants' motion for summary judgment on this claim will be granted.

B. Constitutionality as Applied.

Defendants also contend that the Minnesota notification/judicial bypass procedure does not violate the due process clause as applied. They present three arguments. First, defendants argue that the notification/judicial bypass procedure is being applied in conformance with the relevant constitutional standards of Bellotti II. Second, defendants suggest that any issues of fact concerning the so-called effects of the notification/judicial bypass procedure are immaterial to the constitu-

tionality of the statute as applied. Finally, defendants contend that plaintiffs' allegedly anecdotal evidence of isolated instances in which the notification/judicial bypass procedure has not been applied in conformance with relevant constitutional standards is insufficient to create any genuine issue of fact common to the class concerning the constitutionality of the statute as applied to the class. Defendants present the court with lengthy exhibits to support their position that no material facts are in dispute.

Plaintiffs counter each of defendants' arguments and contend that the defendants have omitted, misstated, and drawn improper inferences from genuine issues of fact. Plaintiffs also present the court with lengthy exhibits which they contend show that there are genuine

issues of material facts relating to the operation and effects of the notification/judicial bypass procedure.

This court has reviewed all the files, records and proceedings in this action as they relate to the due process as applied cause of action. Based upon that review, the court is of the opinion that there are genuine issues of material fact in dispute on this claim and that defendants have failed to show that plaintiffs are not entitled to recover under any discernible circumstances. Specifically, plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept defendants' contention

that plaintiffs have presented only immaterial and anecdotal factual issues.

Professors Wright and Miller have cautioned, in the context of summary judgment motions, that "[b]efore the court can apply the law, it must have an adequate factual basis for doing so. In some situations, a fuller development of the facts may serve to clarify the law or help the court determine its application to the case." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2725, at 85 (2d ed. 1983). In the instant action, the due process as applied challenge provides just such a situation where a complete factual record is necessary prior to a resolution of the claim.

The First Circuit has suggested, in an analogous context, that "a requirement unduly burdensome in operation

[as to offend due process] will be struck down even if not clearly invalid on its face." Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1011. Thus, plaintiffs allege a viable cause of action. For example, Judge Wright in the Western District of Missouri has enjoined the Missouri statute upheld in Ashcroft because the statute "as presently applied unconstitutionally burdens and impinges upon the rights of plaintiff and of other memebers of her class to the free exercise of an abortion, both in the election and in the effectuation of the same, . . ." T.L.J. v. Ashcroft, No. 83-4398-CV-C-5 (W.D. Mo. Nov. 4, 1983) (temporary restraining order). In the instant action, however, genuine questions of material fact remain at this time as to whether the Minnesota notification/judicial bypass

procedure violates the due process clause as applied. As such, defendants' motion for summary judgment on this claim will be denied.

III. Equal Protection

Plaintiffs present two equal protection challenges to the constitutionality of the Minnesota parental notification/judicial bypass statute. First, plaintiffs allege that the statute violates equal protection by imposing requirements upon minors seeking abortions without imposing similar requirements upon minors who seek to carry their pregnancies to term or who seek other health care services. Amended complaint ¶ 51(a). Second, plaintiffs allege that the statute violates equal protection by imposing requirements upon unemancipated minors who seek abortions without imposing similar requirements upon

emancipated minors who seek abortions. Id. ¶ 51(b).[1/]

Before examining each specific equal protection challenge, the court must first determine the burden of justification that the created classification must meet. The basic framework of equal protection analysis requires a decision as to whether the state legislation "operates to the disadvantage of some suspect class or impinges upon a fundamental right . . . protected by the Constitution, thereby requiring strict scrutiny . . . .If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose . . . . " San Antonio School

[1/] Paragraph 51(c) of the amended complaint, which challenges only subdivision 2, rather than subdivision 6, of Minn. Stat. § 144.343(2) is not addressed by defendants' motion.

District v. Rodriguez, 411 U.S. 1, 17 (1973).

Plaintiffs do not argue that the distinction created by the Minnesota statute utilizes any suspect classifications which would justify use of strict scrutiny. Nevertheless, plaintiffs contend that heightened scrutiny is available because the statute impermissibly interferes with the exercise of a fundamental right -- the right to choose an abortion. Roe v. Wade, 410 U.S. 113 (1973). Therefore, according to plaintiffs, the statutory classifications may be justified only by the strict scrutiny test of a compelling state interest or, at a minimum, by a middle level of scrutiny requiring that the classifications be substantially related to a significant state interest. Defendants, however, argue that if

the Minnesota statute does not unduly burden a minor's substantive due process right to choose an abortion, then the classifications can be justified under the rational basis test.

As discussed above, this court has already determined that the Minnesota statute does not on its face impermissibly interfere with a minor's substantive due process right to choose an abortion. Thus, since the exercise of a fundamental right is not infringed, heightened scrutiny is not required. Accordingly, this court will evaluate the Minnesota statute for equal protection purposes under the rational basis test. See Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1012 (rational basis test used for equal protection analysis of Massachusetts parental consent/judicial bypass statute after Bellotti II).

Plaintiffs' first equal protection challenge concerns the distinction between minors seeking abortions and minors seeking childbirth or other health care services. This equal protection challenge was not before the Supreme Court in Akron or Ashcroft and was explicitly not reached in Bellotti II, supra, 443 U.S. at 650 n. 30. Nevertheless, the Supreme Court has rejected challenges to abortion statutes in other contexts based on different treatment between abortions and other medical decisions. See e.g., Matheson, supra, 450 U.S. at 412-13 (parental notice); Harris v. McRae, 448 U.S. 297, 325 (1980) (abortion funding); Danforth, supra, 428 U.S. at 66-67 (written consent); see also American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 296 (3d Cir. 1984) (rejecting equal

protection challenge to Pennsylvania parental consent/judicial bypass statute).

Furthermore, the Supreme Court has recognized that "the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.'" Akron, supra, 103 S. Ct. at 2491 n.10 (quoting Danforth, supra, 428 U.S. at 75). In addition, the state has a legitimate interest in encouraging parental involvement or an alternative judicial procedure in the abortion decision of minors. See id. Based on these interests, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than a decision to bear a child or to seek other health care ser-

vices. See Bellotti II, supra, 443 U.S. at 640-41, 648-49; Thornburgh, supra, 737 F.2d at 296; Planned Parenthood League v. Bellotti, supra, 641 F.2d at 1012-13. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between abortion and other health care services, including childbirth, sought by minors is rationally related to the state's legitimate interest in protecting the well-being of minors and does not violate equal protection.

Plaintiffs' second equal protection challenge addresses the distinction between unemancipated minors as opposed to emancipated minors seeking abortions. A similar equal protection argument was raised in Planned Parenthood Association v. Ashcroft, supra, 655 F.2d 848, against a Missouri judicial bypass

procedure similar to the Minnesota statute challenged here. Appellants argued that the statute was underinclusive because it did not require the involvement of the parents of emancipated minors regardless of their maturity. The Eighth Circuit rejected the argument, acknowledging that while "the classification may not be perfect, we conclude emancipation is a sufficiently accurate indicia of dependence on parental advice to serve as the basis for a legislative judgment . . . ." Id. at 860. As noted above, the state has a legitimate interest in encouraging parental or judicial involvement in the abortion decisions of minors. Despite this interest, however, the state may rationally conclude that minors who are emancipated are sufficiently mature to make an abortion decision without

parental or judicial involvement. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between unemancipated and emancipated minors seeking abortions is rationally related to a legitimate state interest and does not violate equal protection.

At oral argument, plaintiffs asserted that there are fact issues precluding the entry of summary judgment on the equal protection claim. Nowhere, however, do plaintiffs present any issues of disputed material fact relevant to this claim other than the facts presented on the due process as applied claim. Moreover, this court concludes that the equal protection claim presents questions of law which subjects it to dismissal upon a summary judgment motion. In sum, the court concludes that

the Minnesota notification/judicial bypass statute does not, as a matter of law, violate the equal protection clause and therefore defendants' motion for summary judgment on this claim will be granted.

IV. State Constitutional Claims

Plaintiffs also allege that the Minnesota notification judicial/bypass statute violates due process, privacy, and equal protection provisions of the Minnesota Constitution and that hearings conducted pursuant to the statute constitute a delegation of administrative power to Minnesota state courts in violation of Article III of the Minnesota Constitution. Defendants argue that these claims are barred by the eleventh amendment as recently interpreted by the Supreme Court in Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900

(1984). Plaintiffs, at oral argument, acknowledged that they do not contest the application of Pennhurst to their state claims in this action. Accordingly, defendants' motion for summary judgment on the state constitutional claims will be granted.

Based upon the foregoing,

IT IS ORDERED That defendants' motion for partial summary judgment be and the same hereby is granted in part and denied in part.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the facial due process claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the due process as applied claim be and the same hereby is in all things denied.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the equal protection claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FINALLY ORDERED That defendants' summary judgment motion on the state constitutional claims be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: January 23, 1985.

DONALD D. ALSOP
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

3-81 CIV 538

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMERICAN CIVIL LIBERTIES UNION FOUNDATION by JANET BENSHOOF, Esq., RACHAEL PINE, Esq. and SUZANNE LYNN, Esq. of New York, New York, appeared on behalf of plaintiffs.

MASLON, EDELMAN, BORMAN & BRAND by WILLIAM PENTELOVITCH, Esq. of Minneapolis, Minnesota, appeared on behalf of plaintiff Planned Parenthood of Minnesota.

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota by JOHN GALUS, special Assistant Attorney General and PETER M. ACKERBERT, Special Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of defendants.

The above-entitled matter came before the court for trial from February 10, 1986, until March 13, 1986, and for argument on June 11, 1986. Having considered the evidence and being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

I. INTRODUCTION

1. Plaintiffs Jane Hodgson, M.D., and Arthur Horowitz, M.D., are licensed physicians engaged in the practice of obstetrics and gynecology, including the performing of abortions, in Minnesota.

2. Plaintiff Meadowbrook Women's Clinic, P.A., provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18 at a medical facility located in St. Louis Park, Minnesota.

3. Plaintiff Planned Parenthood of Minnesota provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in St. Paul, Minnesota.

4. Plaintiff Midwest Health Center for Women provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Minneapolis, Minnesota.

5. Plaintiff Women's Health Center of Duluth, P.A., provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Duluth, Minnesota.

6. Plaintiff Alice Roe was a 16-year old unemancipated minor and seven weeks pregnant at the commencement of this action.

Alice Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

7. Plaintiff Michelle Roe was a 15-year-old unemancipated minor who was pregnant at the commencement of this action. Michelle Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

8. Diane Roe was a 16-year-old unemancipated minor and eight weeks pregnant at the commencement of this action. Diane Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

9. Plaintiff Nadine T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended com-

plaint in this action. Nadine T. asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would have not been in her best interests.

10. Plaintiff Janet T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Janet T. asserts that she was at that time mature and that notification of her father of her desire to have an abortion would have not been in her best interests.

11. Ellen Z. was a 17-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Ellen Z. asserts that she was then mature and that notification of her father of her desire to have an abortion would not have been in her bests interests.

12. Plaintiffs Alice Roe, Michelle Roe, Diane Roe, Nadine T., Janet T., and Ellen Z. represent a class composed of pregnant minors who assert that they are mature and that notification of one or both of their parents would not be in their best interests.

13. Lauren Z. is the mother of plaintiff Ellen Z. Lauren Z. asserts that notification of Ellen Z.'s father of Ellen Z.'s desire to have an abortion would not have been in Ellen Z.'s best interests.

14. Defendants are the State of Minnesota, its Governor and its Attorney General.

15. In 1981, the Legislature of the State of Minnesota enacted Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343 (2)-(7). The statute was to become effective August 1, 1981.

16. Subdivision 2 of the statute generally requires physicians or their agents to

attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 3 defines "parent" as both parents if both are living, one parent if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one. Subdivision 4 of the statute provides that the statutory notice requirement does not apply when the parents have consented to the abortion, when prompt action is needed to preserve the life of the minor, or when the minor reports that she is a victim of sexual or physical abuse or neglect as defined in Minn. Stat. § 626.556. Subdivision 5 subjects anyone performing an abortion in violation of Minn. Stat. § 144.343 (2)-(7) to criminal penalties and civil liability.

17. Subdivision 6 of the statute provides, in the alternative, that if subdivision 2 is ever enjoined by judicial order, then the same notice requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents nevertheless would be in her best interests.

18. In their amended complaints, plaintiffs seek a declaratory judgment that Minn. Stat. § 144.343 (2)-(7) violates the constitutions of the United States and the State of Minnesota and seek a permanent injunction against its enforcement. More particularly, plaintiffs claim that the statute violates their due process rights, both on its face

and as applied; that the statute violates the equal protection clause; and that the statute violates the due process, privacy and equal protection provisions of Article 1 of the Minnesota Constitution and also constitutes the delegation of administrative power to Minnesota state courts in violation of article 3 of the Minnesota Constitution.

19. Before the statute took effect on August 1, 1981, plaintiffs sought a temporary restraining order and preliminary injunction against the statute.

20. On July 31, 1981, the court temporarily restrained enforcement of subdivision 2 of the statute, but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. On March 22, 1982, the court preliminarily enjoined subdivision 6. By virtue of these two rulings, the parental notification requirement and the judicial bypass option of subdivision 6 went

into effect on August 1, 1981, and have remained in effect since that date.

21. By memorandum order of January 23, 1985, the court granted in part and denied in part defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the court granted partial summary judgment for defendants by dismissing all of plaintiffs' state constitutional claims on jurisdictional grounds and by ruling that, on its face, the judicial bypass procedure in subdivision 6 does not violate the constitutional equal protection and due process rights of pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subdivision 6 is being applied unconstitutionally.

II. AVAILABILITY OF ABORTION SERVICES IN THE STATE OF MINNESOTA

22. Abortion services are less accessible in Minnesota than in the country as a whole. In Minnesota, 94% of the counties, or 82 out of 87 counties, have no readily available abortion provider. In 1982, 44% of women in Minnesota ages 15-44 lived in a county with an abortion provider as compared to 72% of the same group in the country as a whole.

23. Access to information about abortion services in out-state Minnesota is comparatively limited. Many second trimester patients come from counties with no abortion providers and thus with no media advertising or listing in telephone books for abortion services.

24. Abortions are performed in only four public and nine private hospitals in Minnesota, and then only if a staff doctor requests it. There are only two hospitals

where a patient can walk in and obtain an abortion: Hennepin County Medical Center and St. Paul-Ramsey. Virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and Minneapolis-St. Paul. Many women have to travel long distances to obtain abortion services.

25. The transportation problems facing women seeking abortion in Minnesota are illustrted by the experiences of those attending the Women's Health Center Clinic in Duluth. The Health Center serves women from 24 counties in Minnesota, 14 counties in Wisconsin, 4 counties in Michigan and the Canadian Province of Ontario. Some of the women served by the Health Center drive six to seven hours to get to the clinic. Airline flights are not available from some areas. Bus service from some areas is infrequent, requiring some women to spend the night in Duluth.

Having to travel long distances creates barriers to obtaining services. These barriers include increased cost, particularly if lodging is required; delayed pregnancy diagnosis and delayed treatment of post-abortion complications; jeopardized privacy of women away from home; and more hazarous travel during winter.

Nearly 30% of all abortions performed in Minnesota in 1982 were obtained by women who lived outside the Twin Cities metropolitan area, an increase of 20% since 1976. The farther a women [sic] has to travel to obtain an abortion, the less likely she is to obtain one.

26. Women of all ages in Minnesota have abortions later in their pregnancies than in the United States as a whole. In 1981, 9.5% of women having abortions in the United States had second trimester abortion, while 13.5% of all women obtaining abortions in

Minnesota did so in their second trimester. In 1982, 15% of women from outside the metropolitan area who had abortions did so during the second trimester as compared with only 10% of metro area women.

27. The cost of an abortion increases with gestational age because the procedure becomes more difficult and requires more skill on the part of the doctor. The Meadowbrook Clinic has the following fee schedule: under 12 weeks gestation, $225; 12-14 weeks, $275; 14-16 weeks, $395; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, Meadowbrook refers patients to St. Paul-Ramsey Hospital where a later abortion (22 weeks) costs $1600-1800; or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000 cash. None of these fees includes the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the re-

sult of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

28. Unfavorable publicity surrounding the abortion procedures and delivery of services has dissuaded some physicians from performing abortions. For example, the Women's Health Center in Duluth has been unable to contract local physicians to perform abortions. The Center has had to import physicians from small communities some distance from Duluth. Physicians are also concerned about the bombings of clinics and doctors' offices. Consequently, some physicians refer their abortion patients elsewhere.

III. APPLICATION OF MINN. STAT. § 144.343 IN MINNESOTA, AUGUST 1, 1981, TO MARCH 13, 1986.

A. Compliance with Bellotti v. Baird, 432 U.S. 622 (1979)

1. Legal Standard

29. Minnesota Statutes § 144.343 (6) provides:

> (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

30. With the exception of a hearing occurring shortly after enactment of § 144.343, judges in Minnesota have faith-

fully applied the standards set forth in subdivision 6. Those judges who consider themselves unable to faithully apply this standard have consistently refused to hear bypass petitions.

31. Courts hearing bypass petitions regularly appoint guardians ad litem and provide appointed counsel to assist minors participating in bypass proceedings.

32. Judges, public defenders, and guardians ad litem do not adhere to a single interpretation of either the "maturity" or "best interests" standard. However, the variation in interpretation of these standards does not exceed that typical of verbally expressed legal standards. Moreover, these differences of interpretation do not produce different results in actual bypass proceedings.

2. Expedition

33. Courts in Hennepin, Ramsey, and St. Louis Counties schedule bypass hearings on a regular basis. When necessitated by pressing need, these courts will hear a number of petitions greater than that normally scheduled for a single day. These courts also have in place procedures for hearing bypass petitions outside of normal business hours on an emergency basis.

34. Two or three days commonly elapse between a minor's first contact with the court and the hearing on her petition. A delay of this duration creates an increased medical risk to an abortion patient, albeit small in magnitude, and may increase the emotional tension attendant upon the judicial proceeding. Moreover, this delay sometimes combines with scheduling difficulties of a minor or her clinic to produce a longer delay. Thus, the delay in judicial bypass

system as executed by courts in the metropolitan counties is burdensome to minor petitioners. However, this delay and its resultant burden are unavoidable and do not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

35. Although the court systems of the non-metropolitan areas have had less frequent occasion to apply the judicial bypass procedures than Hennepin, Ramsey, and St. Louis County courts, these court systems are acquainted with the statute and have applied it conscientiously when called upon to do so.

36. Courts of non-metropolitan counties called upon to hear bypass petitions generally have complied with their statutory obligation to advise petitioners of their right to appointed counsel and to provide such counsel upon request. These courts also generally have appointed guardians ad litem to assist petitioners.

37. Despite conscientious efforts to provide an expeditious court bypass option in non-metropolitan areas, a number of counties are not served by a judge who is willing to hear bypass petitions. A minor in one of these counties must travel to another county, most commonly a metropolitan county, to obtain an expeditious hearing of her petition. Although burdensome, this necessity also does not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

38. On August 13, 1981, the Supreme Court of Minnesota issued an order directing that all petitions under subdivision 6 should initially be filed in and considered by the county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of those two counties. In the same order, the Minnesota Supreme Couirt directed that all

appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey counties.

39. In an amended and supplemental order effective July 1, 1984, the Supreme Court of Minnesota provided that in a unified judicial district, an order denying a petition pursuant to the judicial bypass procedure shall be appealable on the record to two district court judges and if there be a division between those judges, the order denying the petition should stand.

40. No minor has been unable to obtain an expeditious appeal of an order denying her bypass petition.

3. Anonymity

41. Judges, public defenders, guardians ad litem, and court personnel involved in bypass proceedings are aware that Minn. Stat. § 144.343 (6) requires that bypass proceedings be kept strictly confidential. Those

involved in the proceedings take steps to insure confidentiality, including destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. In addition, public defenders and courts have departed from normal routines when adhering to the routine would have threatened confidentiality.

42. The record discloses that the confidentiality of minors electing the judicial bypass option has been breached only in a small number of isolated cases.

B. Burdens Imposed by Minn. Stat § 144.343 (2)-(7)

1. Judicial Bypass Procedure

43. As discussed above, scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a

delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedures to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvenience, and medical risk.

44. The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers.

Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.

Some minors are so upset by the bypass proceeding that thay consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

2. Two Parent Notice Requirement

45. A minor who chooses not to go to court to avoid notifying her parents must notify both parents, if they are living, unless the second one cannot be located through

reasonably diligent effort. The statute makes no exception for a non-custodial parent who is divorced or separated from the custodial parent, or for a parent who never married the custodial parent. No exception is made in the case of a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor is willing to declare that she is a victim of sexual or physical abuse.

46. If a minor declares that she is the victim of sexual or physical abuse, Minn. Stat. § 144.343 (4)(c) obligates the recipient of this information to report it to the local welfare agency, police department, or the country sheriff pursuant to Minn. Stat. § 626.556 (3). This obligation binds counselors and physicians at abortion clinics. The welfare agency must report the information to the law enforcement agency, and vice versa. Minn. Stat. § 626.556 (3).

47. Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

48. In practice, the requirement that the minor notify both parents, if living, affects many minors in single parent homes who have voluntarily notified the custodial parent. No exception is made, for example, in the case of a non-custodial parent who for years has exhibited no interest in the minor's development. No exception is made for parents likely to react with psychological, sexual or physical violence toward

either the minor or the custodial parent. Minors in such circumstances must notify the non-custodial parent, or else go to court for authorization to proceed without notifying the non-custodial parent. Notification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful participation into the family at a time of acute stress. Alternatively, going to court to seek authorization introduces a traumatic distraction into the family relationship at a stressful juncture. The emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

49. The two parent notification requirement also affects minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse

toward either the minor or the notified parent. Here, too, the minor must choose either to notify the second parent or to endure the court bypass procedure. Once again, the emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

50. Instances, such as those described above, in which the requirement that the minor notify both parents of her decision interferes with and burdens parent-child communication voluntarily initiated by the minor are not uncommon. Approximately 20-25% of minors who go to court for authorization are accompanied by one parent or indicate that they have already consulted with one parent.

3. Forty-Eight Hour Waiting Period

51. Minors who elect to notify one or both parents by written notice, including those whose parents refuse to sign

acknowledgement forms despite having been told of their daughters' decision, must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery day following mailing. Thus, Minn. Stat. § 144.343 delays effectuation of a minor's decision to terminate her pregnancy by at least 48 hours and more commonly by 72 hours.

52. This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more.

53. Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in

risk becomes statistically significant when the length of delay reaches one week. Moreover, even delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk.

C. Results of Bypass Proceedings, August 1, 1981, to March 1, 1986

54. The parties agreed to submit statistics reflecting disposition of bypass petitions filed in Minnesota from August 1, 1981, to March 1, 1986, in the form of tables compiling information obtained by affidavit from court officials in each Minnesota county. The table summarizing these statistics by judicial district is appended hereto.

55. During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted.

56. Anomalous circumstances surrounded several of the petitions which were denied. Three denials occurred in Hennepin County. The Honorable Allen Oleisky, Judge of the Hennepin County District Court, Juvenile Division, recalls denying two of the more than one thousand petitions he has heard. One of these petitions was brought by a minor who did not actually wish to have an abortion, but rather to marry her boyfriend. Judge Oleisky denied the petition in order to assist the minor in effectuating this desire by shifting responsibility for preventing the abortion from the minor to the court. The second denial involved a minor whom the judge determined was being coerced into having an abortion by her parents. After determining the minor did not actually wish to have an abortion, Judge Oleisky denied the petition.

The Honorable Gerald G. Martin, County Court Judge for the St. Louis County Family and Juvenile Court, granted all but one of the 225 or 226 petitions he heard during the period for which statistics were compiled. The petition Judge Martin denied was submitted by a rather immature 14 year old who was accompanied to court by her mother. The minor's father had been out of contact with the minor and her mother for more than seven years. Rather than proceed to the best interests inquiry, Judge Martin denied the petition because he was certain a notice mailed to the father's last known address would not reach him.

57. The single denials occurring in Anoka, Mower, and Lyon Counties each occurred in the first petition brought in those respective counties. The Nobles County Court denied one of the two petitions brought there to date. A comparison to the experience in

the metropolitan counties, where the courts have heard large numbers of petitions and granted nearly all, suggests that some or all of the denials occurring in non-metropolitan counties are due more to the courts' unfamiliarity with the judicial bypass statute than to the petitioners' immaturity or best interests. For example, the Anoka County Court denied the first petition brought before it and then granted each of the 19 petitions heard during the remainder of the period for which statistics were compiled.

D. Effectuation of State Interests

1. Asserted State Interests

58. The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such

discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological sequelae that may attend the abortion procedure.

59. The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it "would save lives" by influencing minors to carry their pregnancies to term rather than aborting.

2. Testimony as to Beneficial Effect of Minn. Stat. § 144.343

a. Judicial Bypass/Notice Requirement

60. The court heard testimony of judges who collectively have adjudicated over 90 percent of the parental notification petitions filed since August 1, 1981. None of these judges, on direct or cross examination, identified a positive effect of the law.

Honorable Allen Oleisky has heard over 1,000 parental notification petitions. He characterizes his function as "a routine clerical function on my part, just like putting my seal and stamp on it." Moreover, he believes that the statute dissuades some minors from having abortions because of the fear of going to court in a distant city.

Honorable Gerald Martin stated that he doesn't "perceive any useful public purpose to what [he is] doing in these cases;" moreover, he finds the court experience dif-

ficult for minors. "I think they find it a very nervewracking experience," he testified.

Honorable Neil Riley testified that he saw no beneficial effects of the statute and further that he sympathized with "the predicament" the minors were in.

Honorable William Sweeney testified, "I know as a judge you would like to think your decisions are important, that you are providing some - you are doing some legitimate purpose. What I have come to believe ... [is] that really the judicial function is merely a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent."

He further testified that "the level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very vola-

tile, and the custody questions, is that the level of apprehension is twice what I normally see in court.... You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her - her hands were turning blue and it was warm in my office...."

Mr. Paul Garrity, who adjudicated the same bypass petitions while a judge in Massachusetts, believed that the Massachusetts law accomplished nothing. "It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion." Further, he felt going to court was "absolutely" traumatic for minors. "You know, it was just -- it was just another thing at a very, very difficult time in their lives," he said.

61. Clinic counselors, who participate on a daily basis in the law's implementation, are of a similar mind. Paula Wendt has counseled or supervised the counselling of more than 3,000 minors since the law went into effect. She concludes from her conversations with both parents and minors that the law has not promoted family integrity or communication. The law has, more than anything, disrupted and harmed families.

On the basis of her experience, Tina Welsh concludes that the law has not benefitted intra-family communication. A minor's unplanned pregnancy is a crisis which is not conducive to an attempt to build good family communications. Ms. Welsh does not believe that the law helps teenagers make a better decision about whether to [sic] have an abortion or continue the pregnancy. Requiring a minor to tell either her parents or a judge about her pregnancy and the

reasons she wants an abortion makes no beneficial contribution to the minor's decision.

62. The public defenders who participate in bypass proceedings believe that the law serves no beneficial purpose. Its sole function, in their view, is to create a hurdle and impose additional stress upon the young women. Similarly, the guardians ad litem do not perceive a beneficial purpose to their participation in the process.

63. In most cases, minors seeking judicial authorization to terminate their pregnancies without informing their parents have already made up their minds before coming to court. Thus, judges, public defenders, and guardians ad litem find they impart no information and provide no counseling in the course of the bypass proceeding. Neither does the court system refer minors to their parents for guidance and support, as is

demonstrated by the overwhelming rate of approval. At most, the bypass proceeding furthers the state's interest in providing minors with guidance and emotional support only insofar as the abortion clinics have expanded their counseling of minors at the insistence of judges who hear the petitions. Counselors and administrators from the major Minnesota clinics testified, however, that counseling of minors going to court and that of minors who do not differs merely in that the former are counseled about the court process and the latter are not.

64. Minors who seek authorization in Minnesota courts for confidential abortions tend to be above average in intelligence, education, and personal motivation. They also tend to be ambitious and concerned about the effect their decision will have on their futures.

65. Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

Dr. Gary B. Melton suggested two partial explanations for this phenomenon. First, comparisons of personality functioning between adolescents who abort and those who carry to term generally show more adaptive, healthier functioning in the former group. Adaptation, in turn, marks a level of psychological and emotional development colloquially referred to as "maturity." Second, a minor's desire to maintain a measure of privacy of information about her personal matters is an important indication of individua-

tion, a principal development task of adolescence. Indeed, defendants' witness Dr. Vincent Rue testified that teenagers in the early stage of adolescence are much more likely to discuss a pregnancy than are teenagers in the mid-phase of adolescence who typically would desire more privacy, and teenagers in the latter stages of adolescence who would be the most private, and insist upon confidentiality. Adult women, in Dr. Rue's view, would be most insistent upon maintaining the confidentiality of their decision. Therefore, while there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion," H. L. v. Matheson, 450 U.S. 398, 408 (1981), some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision. Consequently, a

regulation that affects only minors who have elected to terminate their pregnancies and to do so in privacy tends inevitably to reach only mature minors and immature minors driven to this choice by their own best interests. Such a regulation will fail to further the State's interest in protecting immature, non-best interest minors.

66. Dr. Jane Hodgson, a leading practitioner in the field of obstetrics and gynecology, has given Minnesota's parental notification law considerable thought. She concludes, "I honestly think there is no benefit whatsoever." The law has created "nothing but problems" for her teenage patients. Testimony by plaintiffs' other expert witnesses, each of unquestionably high standing in his or her respective field, corroborates this opinion. For example, Dr. Stephen Butzer testified, on the basis of his clinical experience, that when knowledge of

an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or relationship between adolescent and parents is "almost universally negative."

67. Defendants offered the court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses. Dr. Richard T.F. Schmidt does not practice medicine in Minnesota, has never performed an abortion, and does not regularly counsel minors who wish to obtain abortions. Therefore, his testimony is less persuasive than the con-

trary testimony of witnesses closer in each of these respects to the issue before the court.

The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. §144.343 (2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

b. Two Parent Requirement

68. National statistics reveal that approximately one out of every two marriages ends in divorce. There is no testimony in the trial of this case indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study indicating that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents.

69. Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on

these statistics, state officials suggest that the "battering" of women by their partners "has come to be recognized as perhaps the most frequently committed violent crime in the state" of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported.

70. Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with the kind of hostility and angry vindictiveness that characterized the divorce or separation.

The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her oittle [sic] attention and offered little support. Moreover, the testimony revealed no instances in which

beneficial relations between a minor and an absent parent were reestablished following required notification. Therefore, the minor may suffer disappointment when an anticipated reestablishment of her relationship with the absent parent does not occur, as is most likely given the trying circumstances under which communication is renewed.

Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harrassment may continue well beyond the divorce, especially when children are involved.

The reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustra-

tion at the intrusion of the absent parent. Frequently, the custodial parent fears that the absent parent will use the notification to threaten the custody rights of the custodial parent. Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception.

71. Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry

that their consent is not sufficient and fear tht notification will bring the absent parent back into the family in an intrusive and abusive way.

72. Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

c. 48 Hour Waiting Period

73. Some period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors. A waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or

to provide the physician with information which may be relevant to the medical judgments involved.

74. The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

CONCLUSIONS OF LAW

Plaintiffs attack the constitutionality of Minn. Stat. § 144.343 on several fronts. First, plaintiffs contend that § 144.343, subd. 2 is facially unconstitutional because it fails to afford minors the opportunity to obtain a judicial or administrative waiver of the statute's notification requirement. See

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (Ashcroft); Bellotti v. Baird, 432 U.S. 622 (1979) (Bellotti II). Second, plaintiffs contend that even with the judicial bypass procedure of subd. 6 incorporated as subd. 2(c) by virtue of this court's temporary restraining order of July 31, 1981, § 144.343 (2)-(7), as applied in Minnesota, unduly burdens the fourteenth amnedment due process rights of pregnant minors. Even if § 144.343 (2)-(7) is not unconstitutional in its entirety, plaintiffs contend that the statute's requirement that minors notify both parents except when one parent is dead or the minor is unable to locate a parent with reasonable diligence, § 144.343 (2), (3), is unconstitutional. Finally, plaintiffs contend the 48-72 hour waiting period imposed upon minors who choose to notify one or both of their parents in writing, see Minn. Stat. § 144.343

(2)-(4), is unconstitutional because it impermissibly burdens a minor's right to choose abortion.

Noting "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face," see Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1011 (1st Cir. 1981), this court denied defendant's motion for summary judgment with respect to plaintiffs' as applied due process challenge to § 144.343 (2)-(7). Hodgson v. Minnesota, Civ. No. 3-81 538 slip op. at 11 (Jan. 23, 1985). The court found that dispute existed with respect to material issues of fact including the confidentiality of the judicial bypass procedure, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts was not all inclusive. Hodgson, slip op. at 10. Therefore, the action proceeded to trial upon these issues and others.

I. STANDARD OF REVIEW

Every woman has the fundamental right to terminate her pregnancy free from unwarranted government intrusion. Roe v. Wade, 410 U.S. 113 (1973); see Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S.Ct. 2169, 2178 (1986) (specifically reaffirming Roe v. Wade); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983) (Akron) (similar). The right to choose abortion rather than childbirth is "not unqualified and must be considered against important state interests in regulation." Roe v. Wade, 410 U.S. at 154. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whther to terminate her pregnancy. Maher v. Roe, 432 U.S. 464, 473-74 (1977).

A state regulation that burdens an individual's right to decide to terminate her

pregnancy by substantially limiting her access to the means of effectuating that decision is subject to strict judicial scrutiny. Carey v. Population Services International, 431 U.S. 678, 688 (1977). Such a burden is imposed by a regulation that places an obstacle, absolute or otherwise, in the path of one seeking to exercise the protected right. Maher v. Roe, 432 U.S. 464, 472 (1977).

The term "undue burden" does not accurately describe the magnitude of interference necessary to trigger heightened judicial scrutiny. The Supreme Court has squarely rejected this analysis as "wholly incompatible with the existence of the fundamental right recognized in Roe v. Wade." Akron, 462 U.S. at 419-21 n. 1. Indeed, the Court's traditional three tiered constitutional analysis exists to provide the courts a value-neutral framework by which to test the constitu-

tionality of legislative enactments. Determining whether a burden is "undue" as a threshold inquiry would leave available to judges no standard for making this determination but their individual assessment of a statute's worth. Cf. Mississippi University for Women v. Hogan, 458 U.S. 713, 724 n. 9 (1982) ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change."). Thus the term "undue burden" as used, for example, in Maher, 432 U.S. at 473-74, refers to the ultimate constitutional issue under heightened judicial scrutiny, rather than the threshold requirement for

triggering such scrutiny. Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980); Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F. Supp. 625, 630 n. 2 (D.R.I. 1984).

Regulations imposing a constitutionally significant burden on the free exercise of a protected right, including the right to choose to terminate one's pregnancy, must be supported by a compelling state interest. Akron, 462 U.S. at 427; Roe v. Wade, 410 U.S. at 155. Such a regulation must also be narrowly drawn to express only the legitimate state interests at stake. Carey v. Population Services International, 431 U.S. 678, 686, 688 (1977).

Constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (Danforth). See Bellotti II, 433 U.S. at 633; Carey v. Population Services International, 431 U.S. at 693. Similarly, the burdens imposed by state regulation of abortion are no different for minors than for adults. Zbaraz v. Hartigan, 763 F.2d 1532, 1536 (7th Cir. 1985), appeal docketed, No. 85-673 (U.S. Oct. 16, 1985); see Bellotti II, 443 U.S. at 642 ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). Therefore, the degree of burden that triggers heightened judicial scrutiny depends in no way upon whether the regulation applies to minor or adult women.

The Supreme Court, however, long has recognized that a State has somewhat broader authority to regulate the activities of children than of adults. Danforth, 428 U.S. at 74. This broader authority derives from the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. Thus the difference between abortion statutes which regulate adults and those which regulate only minors is that the latter may be justified by a significant state interest that is not present in the case of an adult. Zbaraz v. Hartigan, 763 F.2d at 1536. See Akron, 462 U.S. at 427 n. 10; Carey v. Population Services International, 431 U.S. at 693 n. 15; Danforth, 428 U.S. at 75. In addition, the State is not constitutionally bound to employ the least burdensome method of effectuating its interests. Indiana Planned Parenthood

Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1133 (7th Cir. 1983) (Pearson). Compare Pearson with Carey v. Population Services, 431 U.S. at 688 (state regulation burdening the right of adult women to terminate their pregnancies must "be narrowly drawn to express only the legitimate state interests at stake.") Instead, the state regulation must be rationally calculated to serve the state's significant interests. Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F. Supp. 625, 640 (D.R.I. 1984).

As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interests of the minor. Bellotti II, 443 U.S. at 640. Therefore, a State's interest in protecting immature minors will sustain the requirement of con-

sent, either parental or judicial. Akron, 462 U.S. at 439. But even the State's interest in encouraging parental involvement in their minor children's decision to have an abortion must give way to the constitutional right of a mature minor or an immature minor whose best ineresets are contrary to parental involvement. Id. at 427 n. 10; Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F. Supp. at 640. See Bellotti II, 443 U.S. 649.

Even under the less rigorous standard applicable to regulations burdening the rights of minor women to obtain an abortion, the burden of demonstrating a connection between the regulation and the asserted state policy falls on the state. Carey v. Population Services International, 431 U.S. at 696, 696 n. 22; Pearson, 716 F.2d at 1133. Neither a bare assertion that the burden is connected to a significant state policy,

Carey, 431 U.S. at 696, nor sentiment or folklore, In re Gault, 387 U.S. 1, 21-22 (1967), will satisfy this burden.

Minnesota Statute § 144.343 (2)-(7) requires minors either to notify their parents of their desire to obtain an abortion, or to obtain the judicial waiver of this requirement. The statute does not require parental consent or a waiver of parental consent. The parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements. Moreover, despite the contrary suggestions of individual Members of the Supreme Court, see Akron, 462 U.S. at 469 (O'Connor, J., dissenting); H.L. v. Matheson, 450 U.S. 338, 421 (Stevens. J., concurring), the court concludes that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid,

without regard to whether that "involvement" takes the form of notification or consent. See Akron, 462 U.S. at 427 n. 10; Pearson, 716 F.2d at 1132. See also Bellotti II, 443 U.S. at 647 (statute unconstitutional because, inter alia, it failed to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents").

II. Minn. Stat. § 144.343 (2)

Subdivision 2 of § 144.343 prohibits performing an abortion upon an unemancipated minor, or upon a woman for whom a guardian or conservator has been appointed because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents or guardian or conservator. By its order of July 31, 1981, this court temporarily restrained defendants from enforcing the provisions of Minn. Stat. § 144.343 (2)

because the court found it probable that plaintiffs would be successful in their challenge to subdivision 2. As a result of this restraining order, subdivision 6 of § 144.343 took effect. This subdivision provides that subdivision 2 shall be enforced as though the judicial bypass provisions of subdivision 6 were incorporated as paragraph c of subdivision 2. Subdivision 6 further provides that if the court's temporary injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the substitute paragraph, and the substitute paragraph shall have no force or effect until or unless an injunction or restraining order is again in effect.

A State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may

demonstrate that she is mature enough to make her own decision or that the abortion is in her best interests. Akron, 462 U.S. at 430 n. 10; see Bellotti II, 443 U.S. at 643-44. The unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." Bellotti II, 443 U.S. at 643; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

The Bellotti II court set forth the following requirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this

> showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

443 U.S. at 643-44. A statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion. Id., at 647.

Without the judicial bypass option of subdivision 6, Minn. Stat.§ 144.343 (2) would unduly burden the exercise by minors of the right to seek an abortion. There are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise this right. Bellotti, 443 U.S. at 647. Young, pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct an abortion. Id.; Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1132 (7th Cir. 1983). The interests of the State,

and of these parents, must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. See, e.g., Akron, 428 n. 10. Therefore, the court concludes that it must permanently enjoin defendants from enforcing Minn. Stat. § 144.343 (2) as unmodified by subdivision 6.

III. Constitutionality of Minnesota's Parental Notification Law

Plaintiffs contend that Minn. Stat. § 144.343 (2)-(7) is unconstitutional as applied because it interferes with and burdens minors in the exercise of their constitutional rights and defendants have failed to demonstrate that the statute is necessary, narrowly drawn, and that it is accomplishing significant state interests. Defendants respond that plaintiffs' position improperly asks this court to disregard controlling Supreme Court precedent. In view of the fact

that the relevant legal standards governing the constitutionality of parental notification requirements are not in dispute, see Akron, 462 U.AS. at 439, defendants contend that the scope of this court's inquiry properly is restricted to determining whether the statute complies with the guidelines set forth by the Bellotti II plurality and subsequently approved by majority of the the Supreme Court in Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983).

Plainly, it is within neither the power nor the desire of this court to overrule Supreme Court precedent. E.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983); Jaffree v. Board of School Commissioners, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983). Nevertheless, the court is mindful that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such

> facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) (Citations omitted); see New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1260 (3d Cir. 1986). Compare Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985) (ordinance limiting hours of solicitation held invalid) with City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986) (conducting de novo analysis of validity of similar ordinance). If the court properly may inquire into whether a change has occurred in the factual basis upon which the constitutionality of a statute depends, then surely an inquiry into the existence of a particular state of facts assumed but never demonstrated is at least equally proper. To this court's knowledge, it is the first ever

to examine a parental notification or consent substitute statute in actual operation. See, e.g., Akron 462 U.S. 425 (enforcement of ordinance enjoined before its effective date); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 483 F. Supp. 679, 683 (W.D.Mo. 1980) (statute at issue in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, enjoined on day after becoming effective); Bellotti II, 443 U.S. at 645 n. 25 (because appellees successfully sought to enjoin Massachusetts from putting statute into effect, there existed an "absence of any evidence as to the operation of judicial proceedings under § 12s."). Initiation of the factual inquiry mandated by the Carolene Products court lies squarely within the province of a federal district court. Therefore, this court heard testimony and has made findings of fact with respect to plaintiffs' allegation that Minn. Stat. § 144.343 (2)-(7) is

not rationally related to the State's asserted interests.

Plaintiffs' as applied challenge to the constitutionality of Minn. Stat. § 144.343 (2)-(7) proceeded at trial on two levels. Plaintiffs' more limited challenge attached the sufficiency of Minnesota's compliance with the Bellotti II quidelines for establishing an alternative procedure whereby authorization for the abortion can be obtained. See Bellotti II, 443 U.S. at 643-44. Plainfiffs' broader challenge attacked the assumption, implicit in the Bellotti II and Ashcroft decisions, that a notification or consent requirement imposed in conjunction with an appropriate alternative bypass procedure would serve the State's interest in protecting pregnant minors without unduly burdening the right of mature or best interests minors to obtain an abortion.

The bulk of the testimony at trial related to whether requiring pregnant minors either to notify their parents of their desire to terminate their pregnancies or to go to court to obtain a waiver of the notification requirement actually furthers the State's interest in protecting pregnant minors. The court heard testimony of at least 37 witnesses who spoke to this issue. Only two of these witnesses related facts and expressed opinions from which a court could draw a reasonable inference that the statute does young women more good than harm. Neither of these witnesses, Dr. Vincent Rue or Dr. Richard T.F. Schmidt, has any direct contact with minors affected by Minn. Stat. § 144.343 (2)-(7). Neither witness counsels minors on a regular basis concerning the decision whether to terminate a pregnancy, neither witness performs abortions, and neither witness sees minors who have had abortions on a regular basis.

Of the remaining witnesses who spoke to the issue whether Minn. Stat. § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible affect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious affect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit. Thus five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343 (2)-(7) on the whole

furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity.

The court has considered the possibility that the statute's existence encourages immature, non-best interest minors to tell their parents, and that this intangible effect is not amenable to proof at trial. The court does not believe this to be the case. First, several witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343 (2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, none testified that this

proportion changed at or around the effective date of the Minnesota parental notification law.

Furthermore, the testimony indicates that the sort of independent self-assessment by the minor of her own maturity suggested by this scenario actually does not occur as a result of the statute. Although the major abortion providers in Minnesota inquire into a minor's maturity in the course of the informed consent process, abortion providers do not decline to assist minors because of their immaturity with any frequency. To the contrary, the testimony revealed the major providers tend to resolve any doubts as to a minor's maturity by referring her to the judicial bypass system. These minors are almost universally successful in obtaining judicial waivers. Thus there appears to be little self-selection among those minors who come to the clinics initially without both

parents. Instead, any self-selection as to maturity occurring among pregnant minors appears to be a result of the natural maturation process, rather than an effect of Minn. Stat. § 144.343 (2)-(7). As described in finding of fact number 65, the desire on the part of minors to retain their privacy with respect to the abortion decision is, at least in part, a result of the maturation process. Therefore, it does not appear Minn. Stat. § 144.343 (2)-(7) has any greater beneficial effect upon immature minors than it does upon mature minors and minors whose best interests are not served by notification.

In view of the foregoing, the court finds as a matter of fact that Minn. Stat. § 144.343 (2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors. This is not a case in which the State merely has failed to demonstrate that

the challenged statute employs the alternative means of effectuating its interest that is least burdensome upon the rights of the affected individuals. See Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1134 (7th Cir. 1983) (state is not constitutionally required to provide the least burdensome alternative to notification.). Similarly, this is not a case in which the legislature has utilized a yardstick that is imprecise or even unjust in particular cases. See H.L. v. Matheson, 450 U.S. 398, 425 (1981) (Stevens, J., concurring) (over-inclusiveness of parental-notice requirement does not undercut its validity). Instead, Minn. Stat. § 144.1343 (2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by

notification. This substantial burden is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343 (2)-(7) fails to further either of those interests in any meaningful way. When, as here, the state's asserted interest fails to justify the burden imposed upon pregnant minors by an abortion regulation, the Supreme Court has invalidated such regulations as unduly burdensome upon the rights of pregnant minors. Bellotti II 443 U.S. 622, 651 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).

This court does not, however, write on a clean slate in determining the constitutionality of Minnesota's parental notification statute. The Supreme Court carefully delineated the elements of the alternative procedure states must employ if they wish to require parental consent or notification

prior to abortion. Bellotti II, 443 U.S. at 643-44. Although the Court's discussion of the necessary alternative procedure appears in a plurality opinion and at least arguably was unnecessary to the decision in the Bellotti II case, the Supreme Court left no doubt as to its commitment to the Bellotti II procedure in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). Noting its statement in Akron that the relevant legal standards with respect to parental-consent requirements are not in dispute, 462 U.S. at 439, the Court treated a challenge to the constitutionality of Missouri's consent/bypass statute as an issue purely of statutory construction. Ashcroft, 462 U.S. at 491. Because the Missouri statute at issue could fairly be construed to comply with the Bellotti II requirements, it avoided any constitutional infirmities. Id. at 493.

Because no court has had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation, plaintiffs contend the issue now before this court is far more complex than the statutory interpretation issue addressed by the Ashcroft court. Indeed, it appears to this court that the prophecy with which Mr. Justice Stevens closed his concurrence in Bellotti II is fulfilled.[1/] Nevertheless, this court is bound by applicable Supreme Court precedent. E.g. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 534 (1983); Jaffree v. Board of School Commissioners, 459 U.S. 1314 (Powell, Circuit

1/ In arguing that the Bellotti II case presented the Supreme Court no occasion to render an advisory opinion on the constitutionality of the alternative procedure recommended in Justice Powell's plurality opinion, Justice Stevens predicted "a real statute--rather than a mere outline of a possible statute--and a real case or controversy may well present questions that appear quite different from the hypothetical questions Justice Powell has elected to address." 433 U.S. at 656 n.4 (Stevens, J., concurring).

Justice 1983). This court has made factual findings as to the effect of Minnesota's parental notification law as it affected the minors to whom it applied between its effective date in 1981 and trial in 1986. Were this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343 (2)-(7) under the intermediate scrutiny appropriate in challenges to regulations that burden the fundamental rights of minors. But it is not this court's place to determine the assumptions upon which the Supreme Court based its holdings in Bellotti II and Ashcroft. Nor is it this court's place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made. The Supreme Court directs that this court's inquiry be limited instead to an issue purely of statutory construction: whether Minnesota provides a

judicial alternative that is consistent with established legal standards. Ashcroft, 462 U.S. at 491-92.

Minnesota Statute § 144.343 (2)-(7) satisfies these legal standards. The court has found that Minn. Stat. § 144.343 (6) correctly directs courts hearing bypass petitions to conduct the inquiry required by the Bellotti II court. Although the language of the Minnesota statute with respect to maturity varies slightly from that of the Bellotti II decision, the requirement that the woman be "mature and capable of giving informed consent to the proposed abortion" is the functional and legal equivalent of the Supreme Court's requirement that the minor be "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes." See Bellotti II, 443 U.S. at 643.

Arguably, however, the statute's requirement that the court inquire in the case of an immature minor "whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests" differs from the Court's inquiry whether "the desired abortion would be in her best interests." See id. at 644. Indeed, testimony indicates that some Minnesota courts consider whether the abortion itself is in the minor's best interests, while others examine whether avoiding parental involvement in the minor's decision, whatever it may be, is in the minor's best interests. This court, however, perceives that the former inquiry imposes the greater burden upon the minor in terms of what she must demonstrate before proceeding without involving her parents. Because the Supreme Court's language approves the imposition of this more restrictive standard,

this court concludes that the practice of some Minnesota courts of interpreting Minn. Stat. § 144.343 (6) to require a less intrusive and less burdensome inquiry does not violate the legal standards set forth in Bellotti II and approved in Ashcroft.

The court further finds that judges who hear the bypass petitions in Minnesota faithfully apply the standards set forth in Minn. Stat. § 144.343 (6), and those judges who consider themselves unable to faithfully apply the standard have consistently refused to hear bypass petitions. Furthermore, the court finds that Minnesota courts have established procedures to assure the minors' anonymity, and to expedite both the initial hearing and any subsequent appeal. Finally, the court finds that the delays which do attend the bypass proceedings in practice, although burdensome to minor petitioners, do not reflect a systemic failure to provide a

judicial bypass procedure created by Minn. Stat. § 144.343 (6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, coplies with the procedural requirements set forth in Bellotti II and approved in Ashcroft. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

IV. Two Parent Notification Requirement

Subdivision 3 of Minnesota Statute § 144.343 identifies the individuals entitled to notification as "both parents of the pregnant woman if they are both living, one parent of the woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Plaintiffs contend the statute's two parent notice requirement unduly burdens the exercise by minors of the right to seek an

abortion. The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The

anxiety attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

The State has the burden of demonstrating that its interest in encouraging parental consultation justifies the burden imposed upon pregnant minors by the statute's two parent notification requirement. See, e.g., Carey v. Population Services International, 431 U.S. 678, 696 n. 22 (1977); Pearson, 716 F.2d at 1133. The Supreme Court has concluded that the requirement of obtaining both parents' consent does not unconstitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." Bellotti II, 443 U.S. at 649. When all three live together, both the father and mother have an interest -- one normally supportive -- in helping to determine the course that is

in the best interests of the daughter. Id. This court concludes, however, that a regulation requiring notification of both parents even when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors.

To the contrary, the court finds that the regulation adversely affects communication voluntarily initiated with one parent in a large number of cases. Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent, or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts

the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication. Thus the court concludes that this requirement fails to further the State's interest. Because "state restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest," Carey v. Population Services, 431 U.S. at 693; Danforth, 428 U.S. at 75, the court must enjoin defendants from enforcing the two parent notification requirement of Minn. Stat. § 144.343.

V. Waiting Period

Minnesota Statute § 144.343 (2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. The notice may be delivered personally to the parent by the physician or his agent, or notice may be made by certified mail addressed to the parent at his usual place of abode, with constructive delivery occurring at 12:00 noon on the next day upon which regular mail delivery takes place, subsequent to mailing. Thus minors in Minnesota who choose to notify their parents in writing of their determination to obtain an abortion must wait at least 48 hours, and more commonly approximately 72 hours, between initiating the notification process and the abortion itself.

Lower courts have split on the issue of the constitutionality of mandatory waiting periods imposed upon minor women seeking abortion. Some courts, including this one, have found that a reasonable period of notice is permissible to allow parents to aid, counsel, advise, and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved. Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123, 1138-39 (N.D. Ohio 1986); Hodgson v. Minnesota, Civ. No. 3-81-538, slip op. at 5 (D.Minn. March 22, 1982). The Rosen court concluded that the notification requirement which the Supreme Court explicitly upheld for immature minors in Matheson would be an empty formalism with no practical effect if the abortion could proceed before parental consultation could take place. 633 F. Supp. at 1139.

The Seventh Circuit Court of Appeals has invalidated an Illinois statute requiring pregnant minors to wait 24 hours between notifying their parents and obtaining an abortion. Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), appeal docketed, No. 85-673 (U.S. Oct. 16, 1985). The Zbaraz court based its decision upon its conclusion that the mandatory waiting period placed a direct and substantial burden on women who seek to obtain an abortion, and that the waiting requirement did not significantly further the State's interest in promoting consultation when combined with the notification requirement because the notification requirement itself adequately promotes the State's interest. 763 F.2d at 1537-38. The court further concluded that the statutory alternatives to the mandatory waiting period, such as having both parents accompany the minor to the place the abortion will be performed or having both

parents submit signed, notarized statements indicating they have been notified, do not redeem the statute. Id. at 1538. The Seventh Circuit based its decision in large part upon its prior decision in Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983). There the court upheld a mandatory waiting period to the extent it delayed the abortion for the purpose of effective constructive notice. Id. at 1142-43. Requiring delay after notification has been effected, however, is impermissible. Id.; see Zbaraz, 763 F.2d at 1538.

The Eighth Circuit Court of Appeals three times has affirmed district court decisions that a mandatory 48 hour waiting period, applicable to adult and minor women alike, is unconstitutional. See Women's Services, P.C. v. Thone, 690 F.2d 667, 668-69 (8th Cir. 1982), vacated and remanded for

further consideration sub nom. Kerrey v. Women's Services, P.C., 462 U.S. 1126 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981), aff'd 462 U.S. 476 (1983); Women's Services, P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980), vacated for further consideration sub nom. Thone v. Women's Services, P.C., 452 U.S. 911 (1981). The state of Missouri did not appeal the Eighth Circuit's decision in Ashcroft invalidating the statute's 48 hour waiting period.

This court agrees with the district court for the Northern District of Ohio that a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place. See Rosen, 633 F. Supp. at 1139. However, the waiting period must effectuate actual consultation without unduly burdening the opportunity of

pregnant minors to obtain an abortion. In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely. Therefore, the court concludes that if a minor chooses to notify her parent by certified mail as provided in Minn. Stat. § 144.343 (2)(b), the State properly may deem delivery to occur at 12:00 noon on the next day on which regular mail delivery takes

place, subsequent to mailing. The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. Under conditions presently existing in Minnesota, however, 48 hours is an unreasonable waiting period. Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343 (2).

VI. Severability

Defendants contend that the two parent notification requirement and the 48 hour waiting period, which the court today holds unconstitutional, should be severed from the remainder of Minn. Stat. § 144.343 (2)-(7).

Subdivision 7 of Minnesota's parental notification statute provides:

> If any provision, word, phrase or clause of this action or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase,

> clause or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

This language clearly evinces the legislature's intent that any unconstitutional portions of Minnesota's parental notification statute amenable to severance should be severed.

Subdivision 7 creates a "presumption of divisibility" and places "the burden . . . on the litigant who would escape its operation." Carter v. Carter Co., 298 U.S. 238, 335 (1936) (Cardozo, J.). See Regan v. Time, Inc., 468 U.S. 641, 643 (1984); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 932 (1983). Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. See Regan 468 U.S. at 653; Chadha, 462 U.S. at 932. Severance

is improper, however, if the offending language is "inseparably intertwined" within a subsection of the law. Women's Services, P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980), vacated for further consideration on other grounds sub nom. Thone v. Women's Services P.C., 452 U.S. 911 (1982).

The 48 hour waiting period in Minn. Stat. § 144.343 (2)-(7) is severable from the remainder of the statute. Excising the words "at least 48 hours after" from subdivision 2 does not disable the statute from reasonably effectuating the legislature's intent. Accordingly, the court holds that this language is severable from the remainder of Minn. Stat. § 144.343. See Zbaraz v. Hartigan, 463 F.2d 1532, 1545 (7th Cir. 1985), appeal docketed, No. 85-673 (U.S. Oct. 16, 1985).

The language of subdivision 3 defining "parent" as "both parents of the pregnant woman if they are both living, one parent of

the pregnant woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one" is inseparably intertwined within Minn. Stat. § 144.343 (2)-(7). The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. See Minn. Stat. § 144.343 (7).

In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. For example, the legislature may determine that requiring notice only to one parent is the functional equivalent of requiring notice to both in families enjoying

healthy communication, while requiring notice only to one parent permits the notified parent in an intact but dysfunctional family to exercise his or her judgment concerning the wisdom of notifying the other parent. Alternatively, the legislature may determine that notification of both parents is appropriate when the parents are together and the pregnant minor is living at home. See Bellotti II, 443 U.S. at 649. Other options also may suggest themselves to the legislature. Any of these choices, however, would leave Minn. Stat. § 144.343 (2)-(7) with little resemblance to the program actually intended by the Minnesota legislature. See Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, ___, 106 Sup. Ct. 2169, 2181 (1986); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 472 (1983) (O'Connor, J., dissenting). Therefore, the definition of parent contained

in Minn. Stat. § 144.343 (3) is not severable from the remainder of the statute. The court must enjoin defendants from enforcing Minn. Stat. § 144.343 (2)-(7) in its entirety.

ORDER

Upon the foregoing, the evidence presented at trial, the submissions and arguments of the parties, and the record as presently constituted,

IT IS ORDERED That Minn. Stat. § 144.343 (2)-(7) be and the same hereby is declared unconstitutional.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED That Minn. Stat. § 144.343 (2)-(7) is unconstitutional.

IT IS FURTHER ORDERED That defendants be and the same hereby are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343 (2)-(7).

IT IS FINALLY ORDERED That the following injunction shall issue without security:

IT IS ORDERED, ADJUDGED, AND DECREED That defendants are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343 (2)-(7).

DATED: November 6, 1986.

Donald D. Alsop //s//
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T., and Ellen Z: individually and on behalf of all other persons similarly situated; Lauren Z.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation, Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

The State of Minnesota; Rudy Perpich, as Governor of the Stte of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Defendants.

3-81 CIV 538

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that The State of Minnesota, Rudy Perpich and Hubert H.

Humphrey, III, defendants above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered against defendants in this action on the 6th day of November, 1986.

Dated: November 18, 1986.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____
JOHN B. GALUS
Special Assistant
Attorney General

515 Transportation
Building
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Attorneys for Defendants

Attached to Appellant's
"Appeal Information Form" (Form A)
Eighth Circuit Court of Appeals

ISSUES ON APPEAL

The issues on appeal may include but are not limited to:

1. Is a statutory two-parent notice requirement for an emancipated minor who intends to have an aboriton unconstitutional if the statute also provides for an alternative judicial bypass proceeding?

2. Is a statutory 48-hour waiting period after parental notice unconstitutional if the statute also provides for an alternative judicial bypass proceeding?

3. Did the district court err as a matter of law in holding that the two-parent notice requirement is inseparably intertwined within Minn. Stat. § 144.343, subds. 2-7 (1984) and not severable from the rest of the statute?

4. Is a judicial bypass provision that satisfies procedural requirements approved by the U.S. Supreme Court unconstitutional as an alternative statutory requirement to a parental notice provision?

5. Are parts of the district court's findings of fact clearly erroneous?

6. Did the district court improperly deny in part defendants' motion for summary judgment in its Memorandum Order of January 23, 1985?

ABORTIONS-NOTICE TO PARENTS

CHAPTER 228

H.F.No. 284

An Act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1980, Section 144.343, is amended to read:

144.343. Pregnancy, venereal disease, and alcohol or drug abuse,

Subdivision 1. Minor's consent valid. Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. Notification concerning abortion. Notwithstanding the provisions of Minnesota Statutes, Section 15.162, Subdivisiosn 4, section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered

in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at his usual place of abode and delivered personally to the parent by the physician or his agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at this usual palce of abode with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Subd. 3. Parent, abortion; definitions. For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of

the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. Limitations. No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. Penalty. Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not he held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply

with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. Substitute notification provisions. If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c) (i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting his decision and shall order a record of the evidence to be maintained including his own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7. Severability. If any provision, word, phrase or clause of Laws 1981, Chapter 228 or the application thereof to any person or circumnstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or appli-

cation of Laws 1981, Chapter 228 which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of Laws 1981, Chapter 228 are declared to be severable.

Approved May 19, 1981

144.346 Information to parents

The professional may inform the parent or legal guardian of the minor patient of any treatment given or needed where, in the judgment of the professional, failure to inform the parent or guardian would seriously jeopardize the health of the minor patient. Laws 1971, c. 544, § 6, eff. May 27, 1971.

BEST AVAILA

EXCERPTS FROM TRIAL TESTIMONY

DR. STEVEN BUTZER

* * *

*[1355]A. . . .In another case the daughter felt she was compelled to notify the parents; did not understand her options or choices and I [1356] think she was informed by her doctor that she had to do so. She was a patient of mine and still remains a patient of mine and ended up disclosing to her parents the situation she was in and that has created a fallout also of similar magnitude.

CYNTHIA DALY

* * *

[256]A. I was very careful to explain to them that the petition was asking for an order authorizing the clinic to perform an abortion without notice.

*Numbers appearing in brackets in text indicate pa numbers of original stenographic transcript of

BLE COPY

I believe it was their perception that they were trying to get an order to get an abortion. I take the position that the court proceeding only goes toward the modus and I would try to explain to them that they had a free choice in this matter. Just because they had gone to court didn't mean they had to have an abortion. It was authorized, an abortion, if they should choose to have an abortion, you know.

When it comes right down to it, they could get it without notice to their parents. I was very clear, I tried to make them understand that this was notice, Judge Petersen wasn't signing an order that they have an abortion.

DR. EDWARD EHLINGER

* * *

2025]Q. Can you describe to us what it means that the birth rate for 15 to 17-year-olds is steadily increasing since 1980 while the abortion rate is declining?

A. Well, what that means is that a greater percentage of 15 to 17-year-old women are carrying their babies to delivery and fewer are opting for an abortion.

* * *

[2030]A. Many of the other factors that would affect the birth rate and the abortion rate would affect both the 15 to 17-year-old cohort and the 18 and 19-year-old cohort fairly equally. Looking for things that would affect those two population groups unequally the parental notification law stands out as something that would affect the 15 to 17-year-olds more than it would affect the 18 to 19-year-olds.

Q. In fact, the parental -- is it true -- isn't it true that the parental notification law afects -- does not affect 18 to 19-year-olds at all?

A. Well, the law, as stated, will affect the 15 to 17-year-olds. . . .

* * *

[1321]Q. About how many minor petitions did you hear of the Massachusetts statute since 1980?

A. I have given that some thought. Over 100 and probably less than 200 or almost 200.

* * *

[1325]Q. So you in some 200 cases you heard you found maturity in every instance?

A. There was never any question, it wasn't even a close call.

* * *

[1328]Q. Did you ever see any minors who had first approached their parents but couldn't have parental consent or were these minors who came because they didn't want to make the initial contact in the first place?

A. I can't recall of a minor who had approached a parent and didn't get consent. There may have been but I can't recall any.

* * *

Q. Do you have any opinion as to what the law is accomplishing in Massachusetts?

Q. It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion and if abortion is legal, it doesn't seem to me to make any sense to go throught [sic] this barrier which my sense is. . . .

DR. PAUL DUANE GUNDERSON

* * *

[2454]Q. So if nationally 9.5 percent of all women get abortions in the second trimester compared with minors in Minnesota, 23 percent getting abortions in the second trimester, there is a public health problem in Minnesota, is there not?

A. Yes, it is a problem, yes.

Q. And if you look at that first line, 1978 to 1983, the problem for minors is not decreasing, is it?

A. No, there is a slight increase there.

Q. Yes. And the trend, and if you are not familiar please tell me, the trend in the United States, is, as a whole, not Minnesota, is for women to be getting abortions earlier, isn't that true, if you have been reading the CDC?

[2455]A. Yes, overall that is the case, yes.

Q. But Minnesota minors are not participating in that national health trend, are they?

A. Not given the data you have quoted.

Q. Well, it is your data.

A. Uh-huh.

Q. They are not participating in this national public health beneficial trend, are they?

A. That is right.

Q. And that is a public health concern, isn't it?

A. Yes, it is.

* * *

[41]Q. Do you remember after your mom called the clinic how long it was between that time and the time you got an appointment to go into the clinic for an abortion or for the court process?

A. Probably about two weeks.

Q. Do you have any idea why it was that long?

A. Gosh, it could have been because of my mom's job or, you see, I have been through -- I have helped my friends, a couple of my friends through abortions and I have also gone through Meadowbrook and I found that court dates, you know, in getting to court you have to kind of wait, you know, you can't just jump in any day you plan to go and have an abortion. You have to wait until that day and so they only take a certain amount of kids because I have called a couple of times

to court to help my friends out and you do have to wait a couple of days, you know, in order to get in there, maybe a week or so. So that is maybe why.

DR. STANLEY HENSHAW

* * *

[40]THE WITNESS: This shows that if -- if the minors had had the same trends in birth rate compared to the 18 to 19-year-olds as occurred in other states their birth rate would in fact -- would have gone down about three more percentage points than it did. So the suggestion is if the law had any effect it appears more likely that the effect was to slow down the decline in the birth rate rather than to encourage a decline in the birth rate of the minors.

[43] Yes. We at the Alan Guttmacher Institute have tried to estimate the number of women who need abortions in each part of the country. The purpose is to assess the

adequacy of abortion services. By "need" what we mean is the number of women who would obtain an abortion if services were readily available to her.

Q. And can you make any statement about Minnesota's abortion need and its performance in meeting that need?

A. Yes. We have estimated that the need for abortion services in Minnesota in a year, say 1982, is something over 30,000 women. Now we might want to deflate that a little bit [44] because Minnesota is quite a rural state. Rural states more than average anyway a non-metropolitan state. So maybe a little under 30,000 would be my estimate of the number of women in Minnesota who we would estimate have an unintended pregnancy in a year -- well, in 1982 -- and if services were readily available would obtain an abortion.

The number of abortions that actually occurred was on the order of 19,000 in

1982. Our conclusion is that there is a significant amount of unmet need for abortion services in the state.

JACKIE HINES

* * *

[1526]Q. How did you feel about having to go to court?

A. I was very upset because of the fact that I was -- I, of course, being a mother and feeling really this is a daughter of mine, and I felt responsible because I had been the one who said my permission is all you need because I am your custodial parent, so I felt as if I was responsible, partly responsible for this extra hassle that she had to go through and the tears, and really she was more afraid of the court than she was of the clinic.

She had no fear at all of the procedure but she was scared to death to go to court because, "What if they say no, what if they

make me call dad," that is what the trauma was, not the procedure at all.

DR. JANE HODGSON*

* * *

[V.I, 54]Q. When you were Medical Director and sought to engage the services of doctors to do abortions at the various abortion clinics, did you have conversations with doctors to become employed at those clinics, after which conversation the doctor refused? A. Oh, yes, very many. Particularly, this was the case in opening the clinic in Duluth. It was impossible to get local Duluth physicians. It still is. We are -- we have to import physicians from Hibbing and Bemidji and -- I can't think. It's a town near Grand Rapids. Anyway, small communities

*Dr. Hodgson's testimony was given on two days and transcribed as two volumes. The volume number is indicated in the brackets.

some distance from Duluth, all of whom I have trained personally.

* * *

[75]Q. Is it correct to say, then, that your testimony is you tend to use -- you consider laminaria medically advisable more often with teenage patients because of the condition of their cervixes than with adult patients?

A. Oh, very definitely.

* * *

[111]Q. At the Women's Health Center in Duluth where you were Medical Director, what kind of abortions were done?

A. We limited our procedures to 16 weeks. We did not go beyond that.

Q. What would happen to patients who would come in who were over 16 weeks?

A. They were referred to -- had to go to Minneapolis.

* * *

[132]Q. Have you had any patients who do not know who their father is?

A. Yes.... And there was a two-week delay for one minor simply because when they notified the so-called natural father, he refused to acknowledge his paternity...

* * *

[V.II, 11]Q. After this -- after August 1st, 1981, how did your medical practice vis-a-vis your minor patients, change?

A. Well, it -- it was just one -- the law resulted in just one more hurdle that the -- the patient had to overcome. There was -- it's a very complicated process for a teenager to go through and many of them were bewildered, they -- many questions, they didn't understand.

The court -- court process was something that was totally unknown to them....

* * *

[V. II, 14]A. Well, it entailed many problems because we had to -- because of the -- the use of laminaria in the teenagers, for

example. It is considered medically advisable in the young, immature patient with a tight, narrow cervix to insert laminaria.

* * *

So the court process added to this meant that there was really much more than could ever be done in a -- in one day, particularly where patients had to come a long distance, get up early in the morning and drive [V. II, 15] to a clinic. They -- and it's necessary, according to the court system in -- in use at the present time, they have to have a pre-counseling exam and a -- a session and examination and be instructed -- given informed consent and go to court; and then come back, get the laminaria, wait four to six hours as a minimum, and have a procedure, nd then to go home a few hundred miles. You see, it's -- it's an impossible situation.

So what happens is that in many of the clinics, the laminaria is omitted and the

tendency is to -- to -- for the sake of the patient; otherwise, she's not going to get the procedure done at all. So just from the standpoint of time, it made it very difficult.

* * *

[V.II, 23]Q. Have you observed minor patients of yours when they've come back from the court process?

A. Yes, and some of them are wringing wet with perspiration. They're markedly relieved, many of them. The -- they dread the court procedure often more than the actual abortion procedure. And it -- it's frequently necessary to give them a sedative of some kind beforehand.

* * *

[V.II, 56]A. ...And I've seen many of the teenagers that hitchhike when I've been working here in the Twin City area, as well as in Duluth. And they will hitchhike in

extreme kinds of weather which is another hazard, the sub-zero weather in the winter and the hot weather in the summer, and so --

* * *

[V.II, 59]Q. If a teenager is from a family in Minnesota that receives Medicaid for their medical services,does such Medicaid pay for the teenager's abortion?

A. No. There is -- there are no subsidies granted a patient -- a teenager who chooses to terminate her pregnancy.

KATHY M.

* * *

[124]Q. That is the way you felt.

Were you also worried about time?

A. Yes, because it was -- it seems to me like I had one week before the first trimester was over and so that was a lot of stress too, I mean.

Q. What did you and your mom decide to do?

A. We ended up going to Mason City, that is what I decided to do; we ended up going to Mason City which was two days in Mason City, Iowa, excuse me, which was two days, and it was probably $200 more.

MARY J.

* * *

[637]Q. Do you remember any of the things you were thinking while you were sitting there waiting? What did you think?

A. I was very nervous. I was wondering if the judge would even give me permission to do this, which made me very nervous and very scared, just anticipating the procedure, having to wait to go through all of this before I could finally go back to the clinic.

I was worried about if I would say something wrong to influence the judge's decision, to maybe say no to my case, for whatever reasons he may have thought, I don't know.

SHARON L.

* * *

[725]Q. Do you remember anything about how long you waited for a court appointment, like between the time you called the clinic?

A. I would say about a week, week and a half.

SUSANNE SMITH

* * *

[35]Q. Based on your experience with the abuse field, do you think that child abuse is generally unreported?

A. Yes, that is what all the people in the field strongly believe.

Q. And you personally believe that?

A. Yes, I do.

Q. So it is your testimony, is it not, that those teenagers who are in a situation where there has been family abuse are not able or do not avail themselves of that exception in the statute?

A. With the teenagers we have seen in court, that is true.

* * *

Q. Do you have an opinion as to whether you believe going through the court process and seeing the guardian -- now you have interviewed the teenagers personally -- is difficult for teenagers?

A. It appears to be very difficult for them, yes.

Q. What is the basis for your opinion?

A. The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted, particularly if they have been driving around Minneapolis looking for the building....

* * *

[36] I had a teenager tell me last week when I was describing to her the location of the building, when I said the word Juvenile

Justice Center she said I feel like a criminal and I think that is pretty typical of the reaction that the kids have when they find out they have to go to court.

THOMAS P. WEBBER

* * *

[619] THE WITNESS: The organizations before the Senate included Minnesota Citizens Concerned For Life. Before the Senate and the House organization it tended to be quite similar and Minnesota Citizens Concerned For Life, the Minnesota Catholic Conference and Health Care facilities, the St. Paul -- Minneapolis-St. Paul Archdiocesan Council of Catholic Women, the Human Life Alliance, Citizens for Community Action, Minnesota -- I can explain who these groups were if they mean anything to you, Citizens for Community Action is a group that opposes Planned Parenthood's provision of abortion care.

Minnesota Citizens Concerned For Life is the largest antiabortion organization in the state.

The Human Life Alliance is much smaller but somewhat more strident antiabortion organization. All of them testified. In ...

* * *

[619] ...addition to them a group, Minnesota Legal Forum, which at that time, 1981 was Minnesota's local affiliate of Phyllis Shafley's group organized to oppose --

THE COURT: ERA? Minnesota Equal Rights?

THE WITNESS: The Minnesota Eagle, the bird, forum, the Minnesota Eagle Forum; CALM, the acronym stands for Citizen Alert for Liberty and Morality; a group organized by the pastor of the Fundamentalist Church in St. Paul, initially ...

* * *

[621]Q. Would you -- I am still in the offer of proof -- would you please tell us who testified against the bill in either the House, Senate or both?

A. The organizations testifying against both of the bills included the Minnesota Medical Association, the Minnesota Public Health Association, the Minnesota Nurses Association, Planned Parenthood of Minnesota, the Division of Adolescent Medicine at the University of Minnesota, the St. Louis County Health Department, the American Association of University Women, which introduced a very understanding study into testimony; the Lutheran Social Services -- the list went on, it was quite a lengthy list of all of those organizations who did in fact testify along with some individuals.

* * *

[674] THE COURT: Before you leave that, who does provide second trimester, Ramsey County?

THE WITNESS: Second trimester abortion services are available through the Fertility Control Clinic at the St. Paul Ramsey Medical Center. There are other proprietary providers in Hennepin County as well. To our knowledge the only one in Ramsey County, which is where our clinic is located, is the Fertility Control Center at the hospital.

BY MR. PENTELOVITCH:

Q. And no private providers?

[675]A. No, none of the private providers. Meadowbrook Womens Clinic in St. Louis Park, which is a proprietary provider does provide second trimester abortion services as to [sic] some individual physicians, but none on a not-for-profit basis.

* * *

[137]Q. What is the timing involved for minors when you send out notifications, taking into considerations your varying clinic schedules?

A. Sometimes that is a problem because we have to send it out like 48 hours before, so if a woman would call us on Monday and want to get in on a Wednesday, if she called after 12:00 on Monday there would be no way that we could get her in on the Wednesday clinic because we would have had to have mailed the letter before noon and so then we could, you know, we would have to put her on like a Friday clinic or a Saturday clinic.

Q. But isn't it true sometimes you don't have a Friday or Saturday clinic?

A. That is true. The Wednesday clinic is the only clinic that I know that we are always going to have, our Wednesday clinic.

Q. So if a minor calls on Monday morning you might not be able to see her until the next week?

A. If we don't have a clinic, that is true; if she chooses the mail notification.

* * *

[165]Q. Are any of these physically ill?

A. I have had two or three that have vomited, yes.

Q. In the courthouse?

A. Yes.

Q. Have you had any minors who have had medical problems but have had to go through the court?

A. Yes, we did, and that was in Judge Oswald's chambers. I had to bring a nurse with us and Judge Oswald heard her and the mother was with her and what we were worried about is that even though she was electing to have an abortion when we got there we found out she had some physical problems and that

she was starting to spontaneously abort and yet we could not do the procedure until we took her to court.

* * *

[219]Q. How did she comply with the law?

A. The mother came with her and we required a death certificate of the father.

Q. Do you know where the father died?

A. In Massachusetts.

Q. And did they have a death certificate in Minnesota or did they have to get it from Massachusetts?

A. They had to obtain it from Massachusetts.

* * *

[220]Q. Was there a delay in the abortion because of the time to get the death certificate?

A. Yes, there was.

* * *

[21]Q. So the two-day D&E procedures get the laminaria and stay in the Minneapolis area?

A. Right.

Q. Overnight?

A. Right.

Q. How much does an abortion cost at Meadowbrook?

A. If she is under 12 weeks the cost is $225. From 12 to 14 weeks it is $275.

THE COURT: Now you break it at 14 weeks?

THE WITNESS: We have two different fee categories.

THE COURT: All right.

THE WITNESS: A lot of people wouldn't do it all exactly the same way but we do. 14 to 16, $395; 16 to 18, $450; 18 to 19, $550; and 19 to 21, $650.

* * *

[23]Q. What percent of your adult women get second trimester abortions?

A. About 10 percent of our adult women.

Q. What percent of your minor patients get second trimester abortions?

A. About 25 to 28 percent of our minors do.

Q. Referring to the time period between October and December 1985, the last three months of 1985, do you remember how many minors you saw?

A. We saw 200.

Q. Do you know what percent were in the second trimester?

A. Let's see, it was over 30 percent.

* * *

[27] ...We are also somewhat unusual in that we do a lot of second trimester abortions so we will see a fair number of women who have gone somewhere else for an abortion and turned out to be too far along for that

particular clinic or doctor and then will be referred to us.

BY MS. BENSHOOF:

Q. For example, where?

A. Oh, Fargo, Duluth, Sioux Falls.

Q. You mean the doctors there will refer patients that they already have?

A. Right.

Q. Down to Meadowbrook?

A. Right, right; which fits in another delay for these patients.

* * *

[61]A. ...We don't have the kind of time to spend with her talking about her relationship with her parents, her relationship with her boyfriend, how she feels about sexually active at 16, what are her thoughts about contraception. We still do it all but we used to have more time to it before. I think that we used to establish more of a relationship with her.

I think that part of what we do is we are sort of role models and teachers for them because they are young women who are sexually active and they got pregnant and they are having an abortion and some of them aren't very good contraceptors yet and they are good medical consumers yet so we try to do a lot of them with our young women and the law makes it a lot harder for us, makes it a lot harder for her to get what she needs.

Q. When you counsel a minor at 7:30 in the morning, who mght have been up driving for two hours, are her concerns in counseling on the abortion or the court?

A. Her concerns are not on the abortion until she comes back. It is like they put it on hold until they come back. They will go to court and be very determined about that but they are very afraid they are going to denied [sic] and they always want to know what the judge is going to ask me and is he going to let...

* * *

[99]Q. Could you explain the circumstances of that case?

A. It was a very young woman; she was 13, who came in with her boyfriend and they went to court alone and she was terrified of court and she wouldn't talk to anybody. So they would not sign the petition.

Q. You mean literally not talk?

A. Literally not talk. So she came back to me and this was a pretty bad situation because she lived with her father and there were a lot of problems in the family and it was important that she obtain an abortion.

* * *

[106]Q. Can teenagers get one-day D&E procedures when they have to go to court?

A. They cannot.

Q. Why not?

A. Because they have to be in court at 10:30 in the morning. We insert all the

laminaria between 9:30 and 10:00 o'clock in the morning. Once you put the laminaria in the cervix the abortion has begun and we can't insert laminaria and send them downtown to go to court because their petitions have not been approved yet. So for the teenager women who go to court what would be a one-day process for her will become a two-day process.

* * *

[108]A. ...[T]hey don't have the same sort of freedoms that I do, they don't have the money, the time, the privacy. They will come, it is not infrequent, to have Methodist security tell me that they found some of my patients sleeping in their cars in the parking lot or they spent the night in the hospital lobby. I forget they sometimes don't have money for food and motel, you know, so they will do anything to get these arrangements taken care of.

CYNTHIA J.

* * *

[35]Q. And had you not had to secure the court permission and go through all that resulted in that and was involved with that, would you have been able to secure your abortion in the period of one day?

A. Yes.

Q. Would you have been able to secure the abortion at Planned Parenthood, a first trimester abortion?

A. Yes.

BONNIE L.

* * *

[7]A. She told me to call Hennepin County and tell them how far along I was and that it was really necessary that I get in within the week because if I didn't get in within the week it would probably be too late for me to get an abortion at Planned Parenthood.

Q. Within the week, you mean by the end of that [8] particular week?

A. Well, she had kind of, she had emphasized on Thursday. That was the next day. And so she was just hoping on Friday by the latest, so --

Q. So you were talking to her on Wednesday now?

A. Yes.

Q. She was hoping you will get a court hearing on Thursday?

A. Yes.

Q. Did you call the number that she gave you?

A. Yes, I did.

Q. When did you call?

A. I called Wednesday. Right after I talked to Sherry.

Q. And did you get somebody down in Hennepin County Court?

A. Yes, I did. I talked to a lady and told her my situation and she said she didn't have an opening until Monday morning. And I told

her that that would be too late, and asked if she had any other openings. And she said she didn't. I called back Sherry and told her that. Sherry tried contacting them.

* * *

[9]Q. Now, then you called Sherry back you said?

A. Yes.

Q. And you explained to her what happened, I take it?

A. Uh-huh.

Q. Then what happened next?

A. She called them to try to get an appointment and she didn't. She must not have had any luck. She called me back and gave me the Ramsey number or the courthouse.

* * *

A. Yes. She said she didn't have any luck either. Then I called Ramsey and I told them the exact same thing I told Hennepin County and they said they could get me at on Friday at 2:30.

Q. They couldn't do it any earlier that that?

A. No. Friday was the earliest they could do it.

Q. All right. What did you do? Now that is still on Wednesday?

A. Yes, this is.

Q. So then what happened?

A. So after I got everything situated with Ramsey, I called Sherry back and told her and everything was fine, you know, with them. Thursday I had to go to counselling.

* * *

Q. Now, did you have an appointment at Planned Parenthood to go ahead and have the abortion procedure?

A. Yes. I did on Monday.

Q. Go ahead and tell us what time the appointment was for?

A. The appointment was for 9:30 and I went in and had a little more counselling. I had

a checkup and just their basic exam and I went in there to get it and Dr. Hanson sized me again, sized me and said I was too far along and I wouldn't be able to have it at Planned Parenthood.

Q. What do you mean by too far along?

A. I was over the 14 week Planned Parenthood would do. They do up to 14 weeks pregnancy.

* * *

[19]Q. Bonnie, if you had you been able to get a court appointment when you first called Hennepin County within, let's say, the next day, do you know whether or not you would have been able to have the abortion procedure either Thursday or Friday of that week?

A. I probably would have had it Thursday.

Percent Abortions in Second Trimester
Minnesota Residents

AGE	Year					
	1978	1979	1980	1981	1982	1983
<17	18.4	18.7	21.9	20.1	20.6	23.0
18-19	14.7	14.0	16.6	15.1	15.2	16.0
20-24	10.0	10.4	11.2	10.3	10.6	11.0
25+	7.8	7.5	8.5	7.5	8.0	7.9
Total	11.7	11.6	13.1	11.5	11.5	4.4

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 15-17

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions Rate[3]	Pregnancy Rate[3]
1980	6,759	264	39.1	296	43.8	82.9
1981	6,548	270	41.2	253	38.6	79.8
1982	5,877	251	42.7	202	34.4	77.1
1983	5,289	250	47.3	N/A	N/A	N/A
1984	4,933	267	54.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 18-19

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions Rate[3]	Pregnancy Rate[3]
1980	7,628	480	62.9	585	76.7	139.6
1981	6,783	441	65.0	537	79.2	144.2
1982	6,749	445	65.9	458	67.9	133.8
1983	6,744	392	58.1	N/A	N/A	N/A
1984	6,248	394	63.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

ADOLESCENT ABORTION:
Psychological and Legal Issues

Summary of the Report of the Interdivisional Committee on Adolescent Abortion of the American Psychological Association

Few issues in our society are as emotion-laden as the question of the circumstances under which abortion should be legally available. The issue is especially charged in regard to adolescents, because it raises the profound dilemmas of the proper ordering of the interests of the adolescent, her family, and the state. The question is no less basic than whether adolescents are to be considered true persons entitled to respect for privacy in personal decisions.

Beyond the general public interest in issues related to adolescent abortion, psychologists have special interest in the problem, for several reasons. First, although the Supreme Court has recognized the

application of the right to privacy for minors in abortion decisions, the Court has also made clear that states may regulate minors' access to abortions in ways which would be unconstitutional if applied to adult women. It has based the latter conclusion on assumptions that minors are especially vulnerable to deleterious psychological effects of abortions and that pregnant minors are substantially less able than adult pregnant women to make a reasonable decision about whether to terminate a pregnancy. Psychologists can assist courts and legislatures in evaluating the validity of these and related assumptions so as to determine whether there is any compelling basis for age-based regulation of women's access to abortion. Similarly, psychologists can evaluate legal procedures to ensure that they enhance support for pregnant adolescents and that they do not themselves add undue stress or create other unintended negative effects.

Second, as clinicians or counselors in schools, mental health centers, and health care settings, psychologists are often involved in assisting adolescent clients or other health professionals in decisions about abortion. Few situations raise as many complex ethical and legal issues for psychologists. Analogously, there are special ethical and legal problems for psychologists who seek to provide the scientific basis for practice through study of pregnant adolescents' decisions or the effects of their decisions.

Third, and most generally, as scientists and professionals committed to the promotion of human welfare, psychologists are dedicated to ensuring that adolescents and families faced with difficult decisions have access to services which will assist them in understanding the alternatives and dealing with their consequences. Psychologists are

ethically bound to respect individual privacy and to protect the civil rights of their clients.

What Do We Know?

In both absolute and relative terms, abortion is common among adolescents. About 40% of the 1.1 million pregnancies of females under age 20 annually are terminated by induced abortions. Nearly one-third of all abortions are performed on females under age 20. Thus, beyond the profound moral and social issues involved in abortion generally, the sheer frequency of adolescent abortion marks it as a social phenomenon worthy of careful policy analysis.

Quality of Decision Making

The Supreme Court has assumed that adolescents are less likely than adults to make sound decisions when they are faced with

an unintended pregnancy. There is little research directly on point. However, the available evidence suggests that adolescents are as able to conceptualize and reason about treatment alternatives as adults are. The developmental differences which occur in decisions about abortion appear to be related largely to differences in adolescents' and adults' social situations, not their psychological maturity. Thus, adolescents are more likely to perceive their decision as externally determined, and parents frequently are involved in helping to make the decision. Adolescents are also more likely to delay their decision, probably because of a variety of social factors: fear of familial consequences; lack of experience in contacting professionals; lack of money to pay professional fees; concern about confidentiality.

Several states have enacted statutory requirements for notification of parents be-

fore a minor obtains an abortion, and the Supreme Court has upheld the constitutionality of such requirements, at least when applied to immature, unemancipated minors. Parental notice requirements would serve a compelling state interest, however, only if they resulted in a more reasoned decision by the minor. Although the effects of the notice statutes have yet to be evaluated directly, there is reason to believe that they will frequently not have such a positive effect. First, studies of family planning clinics have shown that confidentiality is an important factor for adolescents considering whether to use their services. Lack of confidentiality may increase the tendency already observed among pregnant teenagers, particularly younger teenagers, to delay in seeking professional help. Second, there is considerable evidence that parent-daughter communication about sexuality often leaves

much to be desired. There is little reason to believe that the quality of communication would be greatly improved with a daughter's announcement that she believes that she may be pregnant, even when the law requires parental consultation. Third, while parental involvement is often desirable -- perhaps more frequently than adolescents estimate -- it is also clear that there are circumstances in which parental consultation is likely to result in neither more reasoned decision making nor diminished risk of psychological harm. That is, when parents support their daughter's decision -- whether to abort or to carry to term -- and permit their daughter to make her own decision with their assistance, the probability of a positive outcome is increased. However, when these conditions are absent, parental involvement may exacerbate stress.

Psychological Effects

The Supreme Court has assumed that adolescents are especially vulnerable to serious psychological harm as sequelae to an abortion and that these risks are substantially less than the psychological risks which arise in the decisions required when a minor carries a fetus to full term. There is no research evidence to support these assumptions. Although adolescents' reactions to abortions may be somewhat more negative on average than adults', the magnitude of the age differences is small. Moreover, when negative reactions occur, they are almost always mild and transitory. Indeed, the most common reaction to abortion among both minors and adults is one of relief. The slightly more negative average response of adolescents is probably related largely to their tendency to delay; the medical procedures involved in abortion late in gestation tend to be more

stressful. If increased governmental regulation of adolescent abortion in fact results in even greater delay, legal procedures ostensibly designed to protect pregnant adolescents may in fact increase the probability of undue stress.

It is noteworthy that the medical morbidity and mortality rates arising from full-term adolescent pregnancy are much greater than those arising from adolescent abortion, especially in the first trimester. Although the data on psychological effects of adoption are limited, the available research indicates that the psychological risks entailed in adolescents' completion of pregnancy -- whether they keep the baby or relinquish it for adoption -- are substantially greater than the psychological risks of adolescent abortion.

Social Effects

That abortion is typically a relatively benign alternative for pregnant adolescents is unsurprising when one considers the social consequences of becoming a teenage parent. Adolescent mothers frequently find their education interrupted, their occupational aspirations stunted, their income diminished, and their marriage (when it occurs) strained. There is often financial and emotional strain for the mother's family of origin, and adolescent fathers often also experience emotional strain and disruptions of education and occupation. Moreover, the children of adolescent mothers are at risk for developmental problems, and they may be more likely to have problems of psychosocial adjustment. In cross-national research, particularly deleterious developmental effects have been observed in children resulting from pregnancies in which an abortion was sought and denied.

What Should Psychologists Do?

As the preceding review of the state of knowledge about adolescent abortion indicates, legal policy has often been grounded on assumptions which do not withstand empirical scrutiny or for which no empirical evidence exists. Whatever the wisdom of existing law, however, psychologists must, of course, assist their adolescent clients within that legal context. This context is often ambiguous and complex, and the underlying moral issues are themselves difficult. Counseling adolescents about abortion decisions (or conducting related research) thus requires extraordinary attention to ethical concerns.

Respect for personal autonomy and privacy demands support for freedom of choice in decisions of great personal significance, like abortion. This general principle is

consonant not only with psychologists' Ethical Principles; it is also consistent with existing legal doctrine, which has been based on concern about the limits of adolescents' rational decision making. Within such an ethical and legal framework, psychologists counseling adolescents about an abortion decision have two principal tasks: (a) to assist adolescents in weighing the alternatives (e.g., abortion; completing the pregnancy and relinquishing the baby for adoption; completing the pregnancy and keeping the baby); (b) to provide emotional support for adolescents so that they can make a sound personal decision under relatively unstressful conditions and that they will not suffer untoward psychological sequelae of the decision itself.

In order to assist adolescents in decision making, psychologists must, of course, be willing to explore the alternatives.

Psychologists whose moral scruples -- whether for or against abortion -- prevent such open discussion should so inform their clients and provide referrals to other counselors, as needed. In order to be of assistance, psychologists must know the alternatives; accordingly, they should be able to explain the legal procedures in their jurisdiction for minors' obtaining abortion with or without parental consent and for placing a child for adoption.

In some jurisdictions, psychological may be unable to guarantee confidentiality to minors who seek counseling about abortion. These constraints should be made clear to clients when they initiate counseling. When legal strictures are unclear (e.g., whether counseling by school psychologists is confidential; whether state-imposed parental notice requirements may be applied to mature minors and if

[INSERT TO FOLLOW]

on adolescent abortion should pay special care to the ethical issues in their research. In addition to usual review by institutional review boards, researchers might

consider establishment of an independent advisory group to safeguard the welfare of participants.

What Should Policymakers Do

Although the policy chosen is likely to have significant psychological consequences, the questions of whether family privacy is superior to individual privacy and when abortion is to be permitted are issues of morality and law, not empirical psychological fact. However, insofar as the legal calculus is based on psychological assumptions, policymakers should stimulate and attend to relevant psychological research. In that regard, there is little evidence to support age-graded policies about abortion; research supports neither the contention that adolescents are especially unlikely to make reasoned decisions about abortion nor the assumption that adolescents are vulnerable to

serious psychological harm as a result of an abortion.

Consideration should be given to abolishing mature minor standards in determination of whether minors are able to obtain an abortion without parental notification or consent. It is hard to imagine a minor too immature to make the decision but mature enough to rear a child. In any case, no research has been conducted to determine whether "maturity" can be reliably and validly assessed. In the absence of clear legal standards, it is very probable that such assessments are often erroneous. In view of the time consumed in performing such assessments and their questionable validity, it is unclear whether a mature minor standard can be effectively implemented even if it makes sense in the abstract.

Finally, government should encourage the development of counseling services for

pregnant adolescents and their families. As the Supreme Court has recognized, these services should be provided by professionals with special training in counseling. Competent counseling is likely to enhance the quality of adolescents' decision making and to minimize emotional strain. Support for research is also essential if counselors are to be able to respond optimally to pregnant adolescents' needs for information and emotional support. The policy of the current Administration to provide few, if any, grants for abortion-related research and counseling services is apt ironically to hamper efforts to facilitate careful and relatively unstressful decisions by pregnant adolescents.

Interdivisional Committee on Adolescent Abortion*

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*Sponsored by Division 37 (Child, Youth, and Family Services) of the American Psychological Association, in collaboration with Divisions 34 (Population and Environment), 35 (Psychology of Women), and 41 (American Psychology-Law Society).

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FILED
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No. 86-882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE; ALICE ROE; DIANA ROE; NADINE T.; JANET T.; and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

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QUESTION PRESENTED

Should a prejudgment writ of certiorari be granted where the case does not present an issue of urgent public importance and where another case already before the Court, with which Petitioners urge tandem consideration, raises a much narrower issue?

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IN THE

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OCTOBER TERM, 1986

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of this case prior to judgment by the Eighth Circuit Court of Appeals.

STATEMENT OF THE CASE

A. The Statute.

The statute at issue in this case is set forth at 143a-151a of Petitioners' Appendix (hereinafter cited "P.A.").

B. History of the Litigation.

Plaintiffs'[1] chronology of events as set forth on pages 3-5 of the Petition is substantially accurate. However, it is seriously deficient in at least one critical respect. Plaintiffs refer only in passing to the order of the district court on January 23, 1985 granting Defendants summary judgment on four of five issues. Such brief mention, however, fails to do justice to the effect of that order in framing the issues for trial and ultimate decision by the district court.

The full text of the district court's summary judgment order as set out at P.A. 1a-33a makes it clear that the issues upon which trial was to focus did not include those which Plaintiffs now advance as requiring this Court's immediate attention. In granting partial summary judgment, the district court acknowledged that the legal framework for this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983). Thus the district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notifica-

---

[1] Respondents/Defendants will follow Petitioners' practice of referring to the parties by their posture in the district court.

> tion/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional.

Memorandum Order of the District Court, Alsop, J., dated January 23, 1985 (hereinafter "Summary Judgment Order"). P.A. at 12a.

> The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

Id. at 13a.

Thus it is clear, and Defendants reasonably believed, that trial in this matter was not to be held to explore, through alleged "evidence," the correctness of the legal principles recognized by this Court in *Ashcroft*, 462 U.S. 476 (1983); *Matheson*, 450 U.S. 398 (1981); and *Bellotti II*, 443 U.S. 622 (1979). Nor would it appear that the factual nature of the supposed "burden" imposed by the underlying requirement of advance notice to both parents was to be tried as an issue of fact insofar as it relates to the functioning of the notice/bypass system operating in tandem.

What was reserved by the district court for trial was the question of whether the Minnesota parental notification/judicial bypass system functioned in accordance with the *Bellotti II* standards.

> [T]he court is of the opinion that there are genuine issues of material fact in dispute on this claim and that Defendants have failed to show that Plaintiffs are not

> entitled to recover under any discernible circumstances. Specifically, Plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept Defendants' contention that Plaintiffs have presented only immaterial and anecdotal factual issues.

Summary Judgment Order. P.A. at 19a-20a.

Upon these factual issues which *were* framed for trial, it is clear that the Defendants were entitled to, and did, prevail.[2] Unaccountably, however, the district court, notwithstanding its conclusions of law upon summary judgment, invalidated the statute because it felt that the 48 hour waiting period and the two-parent notice requirement applicable to those minors who do not obtain judicial dispensation are unduly burdensome.

It is also pertinent to note that subsequent to the proceedings set forth in the Petitioners' statement of the case, the district court denied a motion to stay its injunction pending appeal to the Eighth Circuit.[3]

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[2] *See* Findings of Fact, Conclusions of Law and Order of the District Court dated November 6, 1986 (hereinafter "Final Order"), findings No. 30-42 at P.A. 50a-56a; Conclusions of Law at P.A. 119a-120a; and Final Order at P.A. at 120a, where the court says:

> [Accordingly, the court concludes that the] judicial bypass procedure created by Minn. Stat. § 144.343 (6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, complies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

(Bracketed material omitted in Petitioners' Appendix.)

[3] *Hodgson v. State of Minnesota*, No. 3-81 Civ. 538 (D. Minn. Dec. 1, 1986) (order of Alsop, J.).

REASON FOR DENYING THE WRIT

This Case Does Not Satisfy the Criteria Established by This Court for Justifying the Extraordinary Relief Requested.

Rule 18 of the Supreme Court of the United States provides:

> A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

This case simply does not meet that standard. That is not to say that the constitutional and public policy issues raised herein are not important. Nor are they without the keen and substantial interest of both the parties here and the governments and citizens of other states. However, virtually *all* cases ultimately chosen for hearing by this Court involve important legal issues of substantial national interest. The clear and proper tenor of Rule 18 is that the orderly appellate process is to be circumvented only in those rare instances of special exigency or national crisis in which the welfare of the nation or the ability to carry out a strong national policy demands swift and final resolution by this Court itself. This case, important as it is to the people of Minnesota, does not presently fall into that category. It does *not* deal with an urgent constitutional crisis at the highest levels of government as was the case in *United States v. Nixon*, 418 U.S. 683 (1974). Nor does it deal with the authority to sustain the supply of needed materials in a time of national emergency as in *United States v. United Mine Workers*, 330 U.S. 579 (1952). There is not even the sense of need for prompt resolution of

nationwide federal authority prior to upcoming national elections that prompted the Court's action in *United States v. Thomas*, 361 U.S. 950 (1960).

This is a case addressing primarily an issue of the functioning of a Minnesota statute administered in Minnesota by Minnesota officials. While it may provide the Court with an opportunity to further develop the concepts already established in such cases as *Bellotti v. Baird*, 443 U.S. 622 (1979); and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983), it does not present a situation in which the claimed rights of any nationwide class of persons must be or would necessarily be quickly resolved. Indeed since enforcement of the Minnesota law is presently enjoined, even the class of Minnesotans represented by Plaintiffs can make no claim to urgently need the Court's protection.

Nor does the fact that the Court has granted review in *Hartigan v. Zbaraz*, S. Ct. No. 85-673 (review granted, jurisdiction postponed October 16, 1986), justify immediate review of this case. This Court has, in a few special instances, granted certiorari prior to judgment in cases which present similar or identical issues to those already pending before the Court in another case.[4] The tentative pendency of *Zbaraz* with the question of jurisdiction reserved (55 U.S.L.W. 3257), however, presents no argument for prejudgment consideration of this case because the issues presented clearly are not the same. These cases arise neither under the same statute nor under the same facts.

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[4] *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392 (1970) (issues arising from I.C.C. and reorganization court action pertinent to a single proposed merger); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) (cases involving the same facts all questioning coverage of the same federal statute).

In *Zbaraz* the Court has granted review over the narrow issue of whether a 24-hour waiting period following parent notification is facially invalid if coupled with a judicial alternative to notice which has been enjoined pending rulemaking by the Illinois Supreme Court. The lone general similarity between the *Zbaraz* issue and this case lies in the fact that both the Illinois and Minnesota statutes employ a waiting period. However, consideration of the district court's decision about the Minnesota waiting period would be of little value in judging the *Zbaraz* statute. Nor will resolution of *Zbaraz* conclude the numerous issues on appeal to the Eighth Circuit in this case.

As to the Minnesota waiting period, the district court said:

> The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. *Under conditions presently existing in Minnesota*, however, *48 hours is an unreasonable waiting period.* Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343 (2).

P.A. at 131a (emphasis added). Thus one issue in this case involves determination of whether specifically a 48-hour waiting period which was held facially valid is somehow unreasonable due to "conditions presently existing in Minnesota."

The trial court's decision makes no judgment about a given specific shorter waiting period in Minnesota or a 48-hour period under conditions which may exist in other states. Neither will determination of the facial validity of the Illinois statute necessarily resolve the practical validity of the Minnesota waiting period. Thus it is clear that this case

and *Zbaraz* do not present the same issue, even when one focuses solely on the question of waiting period.

In addition, this case, as it exists on appeal in the Eighth Circuit, presents questions which go much beyond the narrow *Zbaraz* question. These include, from the Defendants' perspective, the constitutional necessity and utility of a judicial bypass alternative to a parental notification requirement and the validity of a two-parent notice requirement coupled with a properly functioning judicial bypass system.

On the other hand, Defendants assert that the supposed complete record in this case should be employed by the Court to address the validity of all parental notice requirements everywhere, including that under review in *Zbaraz*. Defendants' arguments in this regard wholly misconstrue both the state of the law in this area and the nature of the issues which were set forth for trial in this case.

If this case may be taken as establishing any fact of nationwide applicability, it is that, through conscientious effort, a state is indeed capable of implementing and carrying out a parent notification/judicial bypass system which complies in practice with the standards set forth by this Court. That is the issue that was properly tried and that is what the trial court properly found. In that respect the case could be seen as having some value in this Court's consideration of future cases involving judicial bypass.

In no sense whatever, however, can the record in this case be taken as "conclusively" demonstrating that even the Minnesota statute, let alone statutes in other states, serves no proper public purpose either on its face or in practice.

This Court in a number of past cases has plainly set forth the bases for the states' authority to require parental notification and even parental consent for minors' abortions. These

bases have been enunciated, not as issues of fact subject to trial, but as fundamental principles inherent in the very fabric of our culture, society and system of government. *See, e.g., Bellotti v. Baird,* 443 U.S. 622 (1979), where this Court recognizes that:

> Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."
>
> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of law designed to aid discharge of that responsibility."

Id. at 638-39 (footnotes and citations omitted.) Thus, there is nothing in the constitutional jurisprudence involving minors' abortions to suggest that, to sustain a statute such

as that in Minnesota, a state must undertake to prove as matters of fact that minors are, on the whole, less mature and more vulnerable than adults; that our society and legal system is correct in presumptively committing the care, nurture, upbringing and control of children to their parents rather than the courts or individual "experts," or even that laws carefully designed to comport with these fundamental principles have achieved, in the short run, a specified quantum of success, in the eyes of the court, in fulfilling their goals. To the contrary, as Justice Stevens has properly observed in *H.L. v. Matheson*, 450 U.S. 398, 424 (1981):

> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur. Good faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

(Stevens, J., concurring.)

As noted above at pages 3-4, the trial court accepted these principles as settled matters of law, not issues of fact for trial. Thus it set for trial the question of whether the Minnesota system actually functions in accord with this Court's announced standards. For these reasons the Defendants, for the most part, refrained from consuming the time

of the trial court or potential witnesses with philosophical or sociological debate over such issues as whether or not 14 year olds are capable of making any and all important decisions totally on their own, or whether or not the desire of a minor to conceal her actions which may lead to parental disappointment or disapproval in itself demonstrates maturity.[5] Neither did the state undertake to counter the testimony of the small number of minors and parents who feared[6] untoward consequences of parental notification with episodic testimony of particular notified parents or notifying minors upon their own relational development following notification.

The fact that such laborious evidence was not pertinent to the issues for trial and, therefore, not brought forth by no means demonstrates "conclusively" that it is nonexistent.

In point of fact, Plaintiffs' alleged "complete" record adds nothing to undercut this Court's prior decisions. In *Bellotti II*, *Matheson*, and *Ashcroft*, it was assumed that many minors will urgently wish to conceal their sexual activity, pregnancy and proposed abortion and that parents when presented with such information may respond in various ways. The question is not whether these assumptions may be valid. Rather, assuming them valid, should parents have the opportunity to address the substantial medical, moral, ethical and psychological issues raised by their young daughter's sexual activity and pregnancy or does the Constitution itself demand that these matters be left absolutely to the girl and her abortion

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[5] This astounding bit of "expert" opinion was actually cited by the trial court in support of the conclusion that the Minnesota statute serves no purpose. *See* Final Order at 76a, 111a.

[6] Plaintiffs presented no direct evidence to establish that even one minor who had notified her parents in accordance with the law had actually been abused, maltreated or prevented from obtaining an abortion as a result of such notice.

provider or other "experts" who intersect her life for a brief period.

Furthermore, as noted above, it is clear that both large portions of the supposedly "complete" record and many of the "findings" of the trial court upon which Plaintiffs rely for support are, to the extent relevant at all, pertinent only to Minnesota. *See, e.g.*, district court findings numbered 22-28[7] (availability of abortion services in Minnesota); 54-57[8] (handling of bypass applications by Minnesota courts); 59[9] (reference to the supposed hopes of some unnamed supporters before a Minnesota legislative committee); 68[10] (Minnesota minors residing with natural parents). *See also* Conclusions of Law at P.A. 130a where the trial court discusses "logistical obstacles" supposedly facing Minnesota women traveling from rural areas in Minnesota.

For these reasons it is clear that this case does not justify the extraordinary action of bypassing the jurisdiction of the court of appeals. Rather, this case should follow the orderly process set out by statute and rules for the appellate review of all but the most exigent matters.

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[7] P.A. at 45a-47a.
[8] P.A. at 64a-67a.
[9] P.A. at 68a.
[10] P.A. at 80a.

CONCLUSION

For the foregoing reasons Respondents urge the Court to deny the Petitioners' attempt to unnecessarily circumvent the normal appellate process. Should certiorari be granted, however, Respondents intend to seek review upon all the issues pending in the Court of Appeals for the Eighth Circuit through a cross-petition for certiorari to be separately filed.

Respectfully submitted,

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No. 86-882 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z.; individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

STATEMENT OF APPELLEES IN HARTIGAN v. ZBARAZ No. 85-673, IN SUPPORT OF PETITIONERS' MOTION IN HODGSON v. MINNESOTA, NO. 86-882, TO GRANT CERTIORARI IN THAT CASE AND TO ARGUE HODGSON IN TANDEM WITH HARTIGAN.

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STATEMENT OF APPELLEES IN HARTIGAN v. ZBARAZ, No. 85-673, IN SUPPORT OF PETITIONERS' MOTION IN HODGSON v. MINNESOTA, No. 86-882 TO GRANT CERTIORARI IN THAT CASE AND TO ARGUE HODGSON IN TANDEM WITH HARTIGAN.

Plaintiffs-appellees in Hartigan v. Zbaraz, No. 85-673, respectfully urge this Court to grant certiorari to review the district court's decision in Hodgson v. Minnesota, No. 86-882, and further urge the Court to expedite review of Hodgson so that argument of Zbaraz and Hodgson may be heard in tandem. None of the parties in Zbaraz will suffer any prejudice by the minimal delays anticipated should the motion of the Hodgson petitioners be granted. Moreover, consolidated review would enhance the presentation of the important constitutional issues presented in both cases.

In further support of the Hodgson motion for expedited and joint consideration, plaintiffs-appellees in Zbaraz state the following:

1. While reserving the issue of its jurisdiction to hear the appeal brought by the State of Illinois from the decision of the United States Court of Appeals for the Seventh Circuit striking down part of the Illinios Parental Notice of Abortion Act of 1983, this Court announced on October 14, 1986 that it would review the following question presented by Mr. Hartigan in the State's jurisdictional statement in Hartigan v. Zbaraz, No. 85-673:

> Whether Illinois may constitutionally impose a waiting period, applicable only to minors and incompetents, after parental notification but before an abortion is performed, where it also provides a judicial alternative to notification.

2. The constitutionality of the mandatory waiting period provision now before this Court for review in Zbaraz is but one part of the comprehensive Illinois Parental Notice of Abortion Act of 1983.

a. The Illinois General Assembly enacted the Parental Notice of Abortion Act less than five months after this Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), striking down a mandatory 24 hour waiting period imposed upon all women, adults and minors, seeking an abortion. Relying upon Akron and the affidavits submitted by plaintiffs, the district court granted plaintiffs' motion for summary judgment and declared unconstitutional the mandatory 24 hour waiting period imposed by the Act. The district court also found inadequate the Act's judicial by-pass procedures. No provisions in the Act assured either that the minor's identity would remain anonymous during all phases of the judicial procedure or that any appellate review of her judicial petition would be considered in an expeditious manner, the requisite elements of a by-pass system insisted upon by this Court's decisions in Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983), and Bellotti v. Baird, 443 U.S. 622 (1979). Finding the unconstitutional provisions inseparable from the remaining portions of the Act, the district court permanently enjoined the entire Act. At the time the district court issued its permanent injunction, the Illinois Act had never been implemented or enforced.

b. On appeal, the Seventh Circuit in Zbaraz also found the mandatory waiting period unconstitutional. While agreeing with the district court that the by-pass procedures were inadequate, the Seventh

Circuit declined to issue a final order declaring that section of the Act unconstitutional. Instead, that court continued the injunction but deferred a decision as to the constitutionality of the by-pass procedure until such time, if ever, that the Illinois Supreme Court promulgates the necessary rules for the appellate phases of the by-pass procedure. Although section 5(g) of the Act specifically requested the Illinois Supreme Court to promulgate the requisite rules, the Illinois court had not yet acted at the time of the Seventh Circuit's decision, nor has it acted to this date.

c. Although the constitutionality of the mandatory Illinois waiting period may be reviewed, this Court declined to review that part of the Seventh Circuit's decision continuing the injunction of the entire Act, until such time that the Illinois Supreme Court promulgates constitutionally appropriate rules for the judicial by-pass system. (See Jurisdictional Statement at pp. i, 21-24; Supreme Court order of October 14, 1986, 55 U.S.L.W. at 3247, 3257.) Thus Zbaraz presents for review only a narrow part of an all-inclusive parental notification statute.

3. The Minnesota parental notice statute at issue in Hodgson, like the Illinois Act, is a comprehensive statute mandating a waiting period after both parents of a minor receive notice of her intent to terminate an unwanted pregnancy. Unlike the Illinois Act, however, the Minnesota statute has a fully operative judicial by-pass system that has been in effect for five years. Thus, Hodgson in contrast to Zbaraz, presents to this Court for review a full statutory scheme regulating minors who seek abortions.

4. Moreover, because Hodgson is a challenge to the Minnesota statute as applied, the facts in Hodgson have been fully developed and analyzed by the lower court. The district court in Hodgson concluded that the Minnesota statute, including the mandatory waiting period, was unconstitutional after it reviewed the actual impact that the statute had had, after five years of operation, upon pregnant minors seeking to exercise their fundamental right to choose to have an abortion. The Hodgson court heard the testimony of more than 60 witnesses, including medical and psychological experts, and nearly every judge, public defender, guardian ad litem, nurse, counselor, and physician having experience with the operation and impact of the Minnesota law. (See generally Hodgson v. Humphrey, No. 86-882, Petition for Certiorari.) Hodgson thus presents this Court with a complete record that evaluates the consequences of a parental notice statute on a minor's ability to exercise her constitutional right to choose an abortion, including: the nature and duration of any delays actually occasioned by such a notification process, the medical complications caused by such a delay, and the deleterious effect of the judical by-pass itself on young women who choose that route, such as further delay of the abortion, and the health impact upon and and increased birth rate among those mature minors who the district found were unable to successfully invoke the waiver process. (Hodgson, App. at 58a.)

5. Such a factual record is preferable when determining important constitutional issues of great public concern. See e.g., Socialist Party v. Gilligan, 406 U.S. 583 (1972).

6. Zbaraz, in contrast with Hodgson, presents this Court with a facial challenge to a statute which had not gone into effect, based on limited factual evidence. However, simultaneous review of the decision in Hodgson would facilitate a thorough review of the Zbaraz case. For example, the Hodgson court's finding that the Minnesota parental notice statute, with all its delays and medical consequences does not "in any meaningful way further the State's interest in protecting minors," (Hodgson app. at 108a-109a) will help evaluate whether the Illinois statute furthers, in any way, the Illinois General Assembly's stated purpose of "protecting minors." Likewise, the Hodgson court's finding that state-mandated, involuntary communication between pregnant young women and their parents has an almost "universally negative" effect on family relations and the well-being of the pregnant minor (Hodgson app. at 78a) is of particular importance to the Zbaraz case, given the Illinois General Assembly's purported legislative purpose of "fostering the family structure and preserving it as a viable social unit." Ill. Rev. Stat. ch. 38, par. 81-62.

7. In the past, tandem consideration of similar, but not identical, abortion statutes has helped illuminate the constitutional parameters of the important fundamental right of privacy. See Roe v. Wade, 410 U.S. 113 (1973) (Texas abortion statute prohibited all abortions save those necessary to save the woman's life), considered in tandem with Doe v. Bolton, 410 U.S. 179 (1973) (Georgia abortion statute prohibited all abortions except when: the woman's life or health would be endangered by continuing the pregancy, the fetus would likely be born with a serious anomoly, or the pregnancy resulted from

rape); see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (Missouri statute required all minors to secure parental consent before proceeding with an abortion) considered in tandem with Bellotti v. Baird, 428 U.S. 132 (1976) (Massachusetts statute required a minor to secure the consent of both parents before obtaining an abortion); see Beal v. Doe, 432 U.S. 438 (1977) (Pennsylvania medicaid regulations provided financial assistance only for therapeutic abortions) considered in tandem with Maher v. Roe, 432 U.S. 464 (1977) (Connecticut Welfare Department limits state medical benefits for first trimester abortions to only those that are medically necessary), and with Poelker v. Doe, 432 U.S. 519 (1977) (Publiclly-financed City hospital refused to provide hospital services for indigent women desiring elective, as opposed to therapeutic, abortions); see Harris v. McRae, 448 U.S. 297 (1980) (Hyde Amendment to Title XIX of Social Security Act denied public funding for certain medically necessary abortions) considered in tandem with Williams v. Zbaraz, 448 U.S. 358 (1980) (Illinois statute prohibits state medical assistance benefits payment for all abortions except those "necessary for the preservation of the life of the woman" seek such treatment); see City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Akron ordinance required all second trimester abortions to be performed in hospitals, imposed a mandatory waiting period, and required parental consent for all minors 15 and younger seeking an abortion) considered in tandem with Planned Parenthood Assn. of Kansas City, Inc. v. Ashcroft, 462 U.S. 476 (1983) (Missouri law required all second trimester abortions to be performed in hospitals and required minors to

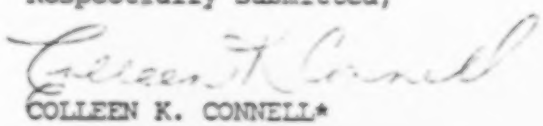
secure parental consent or to pursue the judicial alternative to parental consent); and see Diamond v. Charles, 106 S.Ct. 1697 (1986) (Illinois law governing post-viability abortions required physicians to use method of abortion most favorable to fetus) considered in tandem with Thornburgh v. American College of Obstetricians & Gynecologists, 106 S.Ct. 2169 (1986) (Pennsylvania law required physicians performing post-viability abortions to use method most protective of fetus unless such method imposed a "significantly greater" risk upon the woman).

8. Any delay caused by considering Hodgson in tandem with Zbaraz will not cause any prejudice to the parties in Zbaraz. Indeed, the Illinois Attorney General, appellant in Zbaraz, has requested and received an extension of time in which to submit its brief. (See letter of Roma J. Stewart, Illinois Solicitor General to Supreme Court Clerk, dated November 12, 1986). Appellant Hartigan also sought and received a similar extension of time in which to docket this case in this Court. (Application of Neil F. Hartigan For Extension of Time To Docket case, dated August 9, 1985.) Moreover, any delay in this Court's decision occasioned by granting the Hodgson motion will not prejudice the parties because the Illinois Act will not go into effect until such time as the Illinois Supreme Court promulgates the necessary by-pass rules. Finally, when issues of imperative public importance are presented, the interests of the public are best served by presentation of the constitutional issues upon a fully developed factual record.

Wherefore, for the reasons set forth above, plaintiffs-appellees in Hartigan v. Zbaraz, No. 85-673, respectfully request that this Court grant the petition for certiorari filed in Hodgson v. Humphrey, No. 86-

882, and expedite that case so that it may be reviewed in tandem with Zbaraz. Plaintiffs-appellees in Zbaraz further request that briefing in Zbaraz be stayed until such time as the Hodgson motions are decided.

Respectfully submitted,



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